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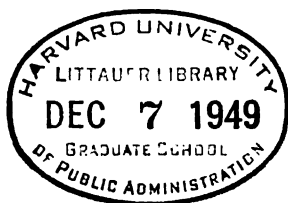
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FEDERAL ANTI-TRUST DECISIONS

CASES DECIDED IN UNITED STATES COURTS

ARISING UNDER, INVOLVING, OR GROWING
OUT OF THE ENFORCEMENT OF

THE ANTI-TRUST ACT OF JULY 2, 1890
(26 STAT., 209)

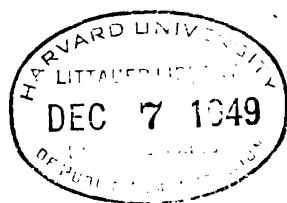
INCLUDING A FEW SOMEWHAT SIMILAR DECISIONS
NOT BASED UPON THAT ACT

1900-1906

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FEDERAL ANTI-TRUST DECISIONS.

VOL. 2
1900-1906.

[354] UNION SEWER-PIPE CO. *v.* CONNELLY.^a

(Circuit Court, N. D. Illinois, N. D. January 29, 1900.)

[99 Fed., 354.]

NOTE TO TRUST—AVOIDANCE.—A note made for a balance due on goods bought from a corporation cannot be avoided merely because the latter is a trust organized to create and carry out restrictions in trade contrary to the common law.^b

SAME.—A note made for a balance due on goods bought from a corporation cannot be avoided merely because the latter is a trust organized to create and carry out restrictions in trade contrary to the "Sherman Act" (Act Cong. July 2, 1890), as that only covers contracts which are themselves in restraint of trade, and does not affect those which "merely indirectly, remotely, incidentally, or collaterally regulate, to a greater or less degree, interstate commerce between the states."

ILLINOIS TRUST LAW—CONSTITUTIONALITY.—Act Ill. July 1, 1893, defining trusts and conspiracies against trade, declaring contracts in violation of its provisions void, etc., provides (section 9) that it shall not apply to agricultural products or live stock while in the hands of producers. *Held*, that such section rendered the entire act void, as a violation of section 1 of the fourteenth amendment of the federal constitution, and the provision of Const. Ill. art. 4, § 22, that, in cases where a general law can be made applicable, no special law shall be passed.

^a Affirmed by Supreme Court (184 U. S., 540). See p. 118.

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Opinion of the Court.

Herbert W. Hamlin and Edwin Walker, for plaintiff.

O'Donnell & Coghlan and John R. McFee, for defendant.

KOHLSAAT, District Judge.

Plaintiff in this case brings suit to recover on certain promissary notes given by defendant for balance due on purchases and deliveries of sewer pipe. Defendant pleads the general issue, and gives notices thereunder of three special defenses, all of which are based upon the theory that plaintiff was a trust or combination organized for the express purpose of creating and carrying out restrictions in trade, contrary (1) to the common law in force both in Ohio and Illinois; (2) to the act of congress of July 2, 1890, commonly called the "Sherman Act"; and (3) to the statute of the state of Illinois taking effect on July 1, 1893.

As to the matters set out in the first notice of special defense, it is undoubtedly true that by the common law contracts which are themselves directly in restraint of trade may, in a proceeding based thereon, be declared void and unenforceable by the courts; but there is no case brought to the attention of the court in which it has been held that at common law a contract not in itself in restraint of trade is void because one of the parties thereto is a party to a contract which is in restraint of trade, and the one contract is indirectly based upon the other. The fact that one party to a contract is engaged in illegal acts will not, at common law, avail the other party as a defense to the enforcement of a contract in itself legal. The first notice of special defense will therefore be stricken out.

It will be seen by an inspection of the so-called "Sherman Act," and of the opinion of Mr. Justice Peckham in the *Addyston Pipe & Steel Co. Case* (decided by the United States supreme court, Dec. [355] 4, 1899) 20 Sup. Ct. 96, Adv. S. U. S. 96, 44 L. Ed. —, that the act only covers contracts which are themselves directly in restraint of trade, and does not affect those which "merely indirectly, remotely, incidentally, or collaterally regulate, to a greater or less

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degree, interstate commerce among the states." It therefore follows that the second matter of special defense set up must be stricken out.

Now, coming to the ground of special defense set up in the third notice, to wit, the Illinois statute which went into effect on July 1, 1893: This statute, in terms, provides that the defense herein set up may be maintained as a bar; and, if the statute is valid, then plaintiff cannot recover in this case, if it be, as averred by defendant, a corporation organized in restraint of trade, and a trust, under the definition contained in said statute. Plaintiff contends that the said statute is unconstitutional (1) because it is obnoxious to section 1 of the fourteenth amendment of the federal constitution, which reads, in part, as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and also (2) because it is in contravention of section 22 of article 4 of the constitution of the state of Illinois, which reads, in part, as follows: "In all other cases where a general law can be made applicable, no special law shall be enacted." The said statute of July 1, 1893, after defining a trust, and setting out the various penalties provided for violation of the act, provides, in section 9, that "the provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." Can it be claimed that, under this clause 9, every person within the jurisdiction of the state of Illinois has equal protection of the laws? Is not this class legislation? Is it in accordance with section 1 of the fourteenth amendment to the federal constitution that those who produce or raise agricultural products or live stock shall be exempted from the provisions of a statute which, by its terms, are binding on every other citizen or person within the state? I think clearly not. I am of the opinion that this statute contains both class and special legislation, and is in contravention of both the federal and state constitutions, and therefore void.

Statement of the Case.

It is urged that, granting the unconstitutionality of said ninth clause, yet it may be declared void without affecting the validity of the remaining clauses of said act. If this were so, then, by declaring said clause void, the courts would make the act binding upon those classes of persons within the state which the legislature had specially exempted from its provisions. This would be judicial legislation of the most flagrant character. In my opinion, the said clause 9 taints the whole act, and renders it all void. Therefore the special defense set up in the third notice must be stricken out. It follows upon the record, as it is with the said three matters of special defense stricken out, that a verdict must be given for the plaintiff for the face of the notes in suit, and interest thereon from maturity at 5 per cent., and the jury will be so instructed.

[985] NATIONAL FOLDING-BOX & PAPER CO. v.
ROBERTSON, ET AL.

(Circuit Court, D. Connecticut. February 9, 1900.)

[99 Fed., 985.]

PATENTS—INFRINGEMENT—FOLDING PAPER BOXES.—The Wilson patent, No. 286360, for an improvement in folding paper boxes, *held* not anticipated, and valid, on motion for a preliminary injunction.

SAME—SUIT FOR INFRINGEMENT—DEFENSES.—The fact that the owner of a patent is a corporation alleged to have been formed in violation of the anti-trust law, and that the patent is alleged to have been assigned to it in furtherance of the illegal purpose to create a monopoly and control the price of an article of commerce, is not available to an infringer of such patent to defeat a suit for the infringement.^a

This is a suit in equity for the infringement of a patent. On motion for a preliminary injunction.

Walter D. Edmonds, for complainant.

Charles W. Comstock and *W. E. Simonds*, for defendants.

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Opinion of the Court.

TOWNSEND, District Judge.

On motion for a preliminary injunction against infringement of the first claim of patent No. 286360, granted October 9, 1883, to Arthur Wilson, for improvement in folding paper boxes. This claim has been sustained by Judge Thomas, after exhaustive consideration of the issues of anticipation and noninfringement, in two opinions in the suit of this complainant against Robert Gair (C. C.; 91 Fed. 905, and 97 Fed. 813). The new evidence introduced related only to patents set up in the answer, but not discussed, in said Gair Case. The defendants relied chiefly on one only of said patents, namely, No. 269682, to Linnett, which they claim exactly corresponds with the boxes of the patent in suit, except in the use of what are known as the tongues and slits for securing the same, and that this construction was suggested by Linnett when he said, "the parts at the ends being attached together to secure them, as by pasting or otherwise [1886] securing the parts," and they contend that the use of such slits and tongues was well known in the art. As pointed out by Judge Thomas in his carefully considered opinion, the merit of the invention in suit is that the end piece, with its tongues, when caught into said apertures and loosely held therein, closes and holds together the end of the box by means of its lever function. This construction dispensed with the exterior perforations of the boxes of the prior art, and reinforced the sides of the box against strain.

Counsel for complainant says the Linnett patent was not presented for Judge Thomas' consideration, because the patent to Arthur, May 15, 1877, No. 190803, which was discussed and considered, covered everything embraced in the Linnett construction. The construction of Arthur is nearer to the patented construction than that of Linnett. It is apparent that neither Arthur nor Linnett had any idea of the clutch invention which Wilson devised. All the other questions herein were before Judge Thomas, and were disposed of by him.

The defendants have also filed a plea in abatement alleging that certain partnerships and corporations which were

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rivals in business, situated in various states, engaged in the manufacture of these boxes, being articles of commerce and in great demand throughout the United States, for the purpose of stifling competition, and controlling and limiting the output of each of said manufacturing concerns, or lessening the amount of production of said goods and articles of commerce, entered into a conspiracy, for the purpose of stipulating and providing for uniform minimum prices of said articles of commerce sold throughout the states, and enhancing the price thereof, and limiting the production of the same, and that, in pursuance of said conspiracy, each of the parties entered into a contract to sell its plant to a new corporation, to be organized under the laws of the state of New Jersey. Said contract was set forth in full. It comprised an agreement between certain firms, persons, and corporations to take stock in said corporation, and provisions for the appraisal of the property of each of the constituent members, and for the allotment to each of them of stock in the new corporation in proportion to such appraisal. The plea in abatement further alleged that said parties further agreed that neither of the persons or companies mentioned in said agreement should engage in the manufacture or sale of said articles of commerce, or directly or indirectly continue in, carry on, or engage in said business of which said articles might form a part, independently of the said National Folding-Box & Paper Company, to be organized as aforesaid, for the period of 49 years, and that during said period the parties should refrain from entering into competition as rivals of said company; and that in pursuance of said conspiracy the parties abandoned the manufacture of such articles, and that said National Folding-Box & Paper Company has carried out all the designs of said parties; and that, in pursuance of said agreement and conspiracy, all the patents have been transferred to said corporation; and that "it was further agreed between the parties * * * that each of the parties to said agreement could and did [987] manufacture said articles of commerce under patents owned by them prior to the formation of said company," and that such articles "were sold by said parties * * * at uniform prices, and upon the same terms,

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without respect to the cost of production or the merits of the respective articles"; and that the patent in suit was conveyed to the complainant corporation in pursuance of said conspiracy to restrain the trade in the states where said plants were located. The plea further alleges as follows:

"The direct tendency and the direct result of said conspiracy and agreement between said parties, as aforesaid, was and did, as intended by the parties thereto, create a scarcity of said articles of commerce, and enhance the price thereof, in the states where said plants were located, and throughout the several states where said articles were in use by the public to a great extent; and the said conspiracy, and the natural results of the same, as intended and designed by the parties to said agreement, and the acts of the parties thereto under the same, are all and each in violation of law, in restraint of trade and commerce between the several states, and are directly prohibited by the common law and the laws of the United States, and, as said illegal and unlawful combination of the parties to said agreement, the said National Folding-Box & Paper Company, have no right, power, or authority to sue or plead in the courts of the United States, in any civil action wherein it invokes the aid of the courts of the United States, to protect the plaintiff to further engage in or carry on the business for which it was illegally organized, and especially to protect it as demanded in this suit, and said combination is illegal and void, and your respondents, therefore, pray that the proceeding in the cause may be abated and dismissed."

This plea was argued under an oral stipulation to the effect that, for the purposes of the motion for a temporary injunction, the facts alleged in said plea should be taken as true, so far as they referred to the contents and execution of the agreements therein alleged, but that this admission should not be construed to extend to any innuendoes contained in the plea respecting the purposes of said agreements, except so far as they appeared on the face thereof, nor respecting the intent or animus of the parties thereto.

The conclusions reached dispense with the necessity of resting the decision on the legality of the agreement alleged in the plea in abatement. It does not appear that the original contract was illegal. There are no provisions therein which, directly or indirectly, refer to any restriction of trade or regulation of output or of prices. The parties thereto bound themselves not to engage in like business for 49 years. This was essential to effectuate the transfer of the good will, and is not unusual in such cases. The allegation that it was further agreed that the parties "could and did manufacture," etc., is in direct conflict with the previous allegation of the plea. To sustain this plea, it would be necessary to

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hold, as claimed by defendants, that a corporation formed in restraint of trade in one state could not, in another state, maintain a suit to restrain the infringement of its patent.

The federal cases chiefly relied on by defendants are *Harrow Co. v. Hench* (C. C.) 76 Fed. 667, affirmed in 27 C. C. A. 349, 83 Fed. 36, 39 L. R. A. 299; *Harrow Co. v. Quick* (C. C.) 67 Fed. 130.

Harrow Co. v. Hench, *supra*, was a suit to enjoin licensees from violating a license contract by selling below the price agreed on therein, and for a decree for the specific performance thereof, which [988] contract was made with a combination controlling 90 per cent. of the manufacturers of certain harrows in the United States. Said contracts prevented licensees from selling their products at a price less than was set forth in a schedule annexed to the license, so that, as the court said, the corporation is simply clothed with the legal title to the assigned patents, while "the several assignors are invested with the exclusive right to manufacture and sell their old-style harrows under their own patents; but all of them must sell at uniform prices, and upon the same terms, without respect to cost or the merits of their respective styles of harrows, and all the members of the combination are strictly forbidden to manufacture or sell any other kind or style of float spring-tooth harrow than they are thus licensed to make and sell." Judge Acheson refused the injunction, and the court of appeals affirmed his decision, taking the ground that the prior owners were the beneficial owners, with right to continue their business, subject only to the restriction in its management imposed by the contract, and that "the result would be the same, in legal contemplation, if the corporation and licenses had been dispensed with, and the contract had provided simply, as it does, for combination and restraint of competition." This was not an infringement suit, but a suit to compel the performance of an unlawful contract. The decision rests upon the fact that the corporation was organized solely for the purpose of making a combination to restrain competition and trade and to enhance prices.

In the same line, Judge Coxe, in the suit of the same complainant against the same defendant (C. C.; 84 Fed. 226),

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to restrain infringement of a patent which had been assigned in accordance with said contract, held that, as the contract was illegal and void, the assignment also was void, and solely on that ground dismissed the complaint.

The only opinion in the federal courts cited by defendant which would seem to support the doctrine that an infringer might defend his illegal acts, even in a case where the complainant was a combination formed for the purpose of restraining trade and competition, is *Harrow Co. v. Quick*, *supra*, in which the learned judge disposed of the question of infringement on the merits, but, in passing on the defense that this same harrow company was an illegal combination, said:

"It seems to me that the court cannot sustain the present bill without giving aid to the unlawful combination or trust represented by the complainant. The question is not free from doubt, but in a case of doubt I feel it my duty to resolve it in such a way as will not lend the countenance of the court to the creation of combinations, trusts, or monopolies."

The court of appeals, however, said on this point:

"While not prepared, in view of the authorities, to sanction the proposition that the infringer of a patent may escape liability by showing that the legal owner is engaged in a supposed unlawful combination or trust, we do not consider the point." 20 C. C. A. 413, 74 Fed. 239.

And in *Columbia Wire Co. v. Freeman Wire Co.* (C. C.) 71 Fed. 306, Judge Adams said:

"I would quite agree with the learned judge who wrote that opinion, that the correctness of his conclusion, even in that case, was not free from doubt."

[989] And he refused to apply said doctrine in a case of infringement.

The question here presented was discussed by Judge Wallace in *Strait v. Harrow Co.* (C. C.) 51 Fed. 819. Judge Wallace says:

"The proposition that the plaintiff, while infringing the rights vested in the defendant under the letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to letters patent, is a novel one, and entirely unwarranted."

The opinion in *Machine Co. v. Smith* (C. C.) 70 Fed. 383, is to the same effect. Judge Simonton says:

"The issues are these: Do the complainants hold letters patent of the United States giving them the exclusive right to make, vend,

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and use certain patentable devices? Have the defendants infringed the rights thus granted? If in procuring these exclusive rights, or if, in their exercise, the complainants have been guilty of fraudulent or improper conduct towards these defendants, the fundamental principles relied on would debar them of any relief in this court. But if, in the absence of these, it is sought to deprive them of their remedy for the infringement of their rights because of their motives in asserting them, such motives are not the subject of judicial inquiry. *Strait v. National Harrow Co.*, 51 Fed. 819. "The rule that one coming into equity must come with clean hands is confined to the conduct of the party in the matter before the court, and not to matters aliunde. Courts of equity, as well as courts of law, will not refuse redress to the suitor because his conduct in other matters not then before the court may not be blameless. It is enough if the suitor shows that he has acted justly, fairly, and legally in the subject-matter of the suit." Beach, Mod. Eq. Jur. § 16, and cases cited."

The distinction between the cases where such a defense might and might not be interposed is stated as follows by Judge Wallace in *Strait v. Harrow Co.*, *supra*:

"If the defendant had brought suit against the plaintiffs for some breach of contract or violation of its alleged rights, founded upon the combination agreement, then it might become pertinent to inquire into the character of the combination, and ascertain whether the court would enforce any rights growing out of it. But, in a suit brought for the infringement of a patent by the owner, any such inquiry, at the behest of the infringer, would be as impertinent as one in respect to the moral character or antecedents of the plaintiff in an ordinary suit for trespass upon his property. Even a gambler, or the keeper of a brothel, cannot be deprived of his property because he is an obnoxious person or a criminal."

The court of appeals in this circuit said in *Light Co. v. Electric Co.*, 3 C. C. A. 605, 53 Fed. 598:

"They [the owners of the patent in suit] do not lose that right merely because they may have joined in a combination with others, holding other patents securing similar monopolies, which combination may, when judicially examined in a proper forum, be held to be unlawful. We do not feel justified in assuming, upon the facts before us in the present suit, that the use which the complainants propose to make of the injunction—an injunction which seems necessary to secure their monopoly and make their patent fruitful—will be such as to promote any other monopoly. When it shall be made to appear that some one, to whom in fairness and good conscience these complainants should sell their lamps, has been arbitrarily refused them, save upon oppressive and unreasonable terms, it will be time to consider whether the complainants should be allowed to continue in possession of the injunction."

In *Soda-Fountain Co. v. Green* (C. C.) 69 Fed. 333, Judge Dallas sustained exceptions to such a plea, and ordered it stricken out as irrelevant, immaterial, and impertinent. The motion for a preliminary injunction is granted.

Statement of the Case.

[900] CITY OF ATLANTA v. CHATTANOOGA FOUNDRY & PIPE CO.^a**MANION ET AL. v. SAME.**

(Circuit Court, E. D. Tennessee, S. D. May 5, 1900.)

[101 Fed., 900.]

MONOPOLIES—ACTION FOR DAMAGES UNDER ANTI-TRUST ACT—LIMITATION.—An action under Anti-Trust Act (Act July 2, 1900; 26 Stat. 209) § 7, providing that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States, * * * and shall recover three fold the damages by him sustained." Is not an action for a penalty or forfeiture, within Rev. St. § 1047, prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," but one for the enforcement of a civil remedy for a private injury, compensatory in its purpose and effect, the recovery permitted in excess of damages actually sustained being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the state in which it is brought.^b

SAME—TENNESSEE STATUTE.—An action brought under such section, in which the right of recovery is based on an alleged exorbitant charge made by defendant to plaintiffs for manufactured articles purchased, by reason of a combination or trust entered into by defendant with others for the purpose of monopolizing trade in violation of the act, is for an injury to personal property, and comes within Shannon's Code Tenn. § 4470, which prescribes a limitation of three years for "actions for injuries to personal or real property," being, in effect, the same as an action on the case for the recovery of the money which plaintiffs were illegally compelled to pay in excess of the fair market value of the articles purchased.

On Demurrers to Pleas Interposing the Defense of the Statute of Limitations of Tennessee.

Pritchard & Sizer, for Manion & Co.

C. P. Gore, L. A. Dean, Westmoreland Bros., and J. L. Faust, for city of Atlanta, Ga.

^a Judgment reversed by the Circuit Court of Appeals, Sixth Circuit, with directions to grant a new trial (127 Fed., 23). See p. 299. Affirmed by Supreme Court Dec. 3, 1906 (203 U. S. —). Not yet officially reported.

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Opinion of the Court.

Brown & Spurlock, for Chattanooga Foundry & Pipe Co.

[901] CLARK, District Judge.

These suits are brought to recover damages under section 7 of the so-called "Anti-Trust Act" of congress of July 2, 1890, which reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The first-named case is a suit on behalf of the city of Atlanta, Ga., a municipal corporation, and the second on behalf of plaintiffs, who aver that they are contractors engaged in the business of furnishing and laying gas, water, and sewer pipes in the city of New Orleans, La. The defendant heretofore has been, and now is, engaged in the business of manufacturing and selling cast-iron pipe and fittings, used for the purposes of public drainage and sewerage, and by gas and water companies in the business of operating gas and water plants. The declarations in the two cases vary slightly in the form of statement of the case. Both suits are actions on the case, and, in substance, proceed upon the ground that the defendant entered into an unlawful trust or combination with others for the purpose of monopolizing trade in violation of the anti-trust act. The trade combination or trust complained of here was involved in *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, Adv. S. U. S. 96, 44 L. Ed. —, and is there fully described. The plaintiffs in each case became purchasers of the manufactured product of the defendant in large quantities, and at prices set out in the declarations. It is charged with sufficient detail that by reason of the unlawful combination and trust contract entered into, the defendants were enabled to advance, and did advance, the price on their manufactured goods, and that the plaintiffs were, in consequence, compelled to pay an exorbitant and unfair price, which is called a "bonus," on the goods purchased. The estimated difference between the just and fair market price of the goods and the price actually

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paid is stated in figures, and the specific damages claimed are laid at this difference between the fair price of the goods and the trust price paid, the declarations concluding with an averment of the right to increase the actual damages sustained threefold, as authorized by the act. Besides other pleas, the defendant interposes as a defense the state statute of limitations of one and three years, as found in the Code of Tennessee (Shannon's Revisal), §§ 4469, 4470,—the former section prescribing a limitation to actions for statute penalties, injuries to the person, and other civil wrongs, not necessary to be noticed; and the latter prescribing a limitation period of three years for injuries to property, real and personal. To these pleas the plaintiffs demur upon the ground that section 1047 of the Revised Statutes applies to the actions, and that the state statute is inapplicable.

The case, in respect of the issues thus presented, turns in part on the distinction between a penalty, as such, imposed by statute for a breach of its provisions, by way of punishment for the act, [902] and in the public interest on the one hand, and a private remedy conferred on a person specially injured by the unlawful act, and by way of compensation for the injury sustained, on the other. If the action authorized by section 7 is a penalty in the sense indicated, it might be conceded for the moment, or for the purposes of the question now to be decided, that section 1047 of the Revised Statutes would be applicable, and under that view the demurrer would be well taken. On the other hand, if the suit is not in its nature and substance a penal action, but a civil remedy for a private injury, compensatory in its purpose and effect, the action is subject to the state statute of limitations applicable to cases of this class, if there be such a statute. *Campbell v. City of Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 240; *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. 62, Adv. S. U. S. 62, 44 L. Ed. —. In the last case cited Mr. Justice Peckham, giving the opinion of the court, said:

“The court below was, as is stated in the opinion, somewhat influenced in its decision of this question by the belief that, if this were not a penal statute, there was no federal statute of limitations applicable to it, and said that it could hardly be supposed that it was the

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intent of congress to permit such a statutory rate of damages to run **without** federal statutory limitation. If there were no such federal statute, then the **state** statute would apply. Although not an action to recover a statutory **penalty or** forfeiture, still, in the absence of any federal statute of limitations, it **would** be limited by the limitation existing for the class of actions to which it **belongs** in the state where the action was brought. *Campbell v. City of Haverhill*, 155 U. S. 610, 614, 15 Sup. Ct. 217, 39 L. Ed. 270."

See, also, *Cockrill v. Butler* (C. C.) 78 Fed. 679.

Section 1047 of the Revised Statutes prescribes limitations as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: provided, that the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property."

It is necessary, therefore, to determine the question whether the suits are essentially penal or civil actions in their object and result. This question whether the action authorized is intended as a punishment or as compensation obviously involves the distinction between a civil remedy and a penal action in its primary or international meaning, this being the sense which was under consideration in the leading case of *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, in which Mr. Justice Gray, for the court, said:

"In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws."

In the previous case of *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, Mr. Justice Gray, for the court, had said:

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, [903] but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties."

In *Huntington v. Attrill* [1893] App. Cas. 150, before the privy council of England, precisely the same question was in

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judgment as that involved **and decided** in *Huntington v. Attrill*, *supra*, the suit being between the same parties. Lord Watson, delivering the judgment of their lordships, quoted the above passage from *Wisconsin v. Pelican Ins. Co.*, rendering in italics the words "but to all suits in favor of the state," and then went on to say:

"Their lordships do not hesitate to accept that exposition of the law which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the state whose law has been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the state law, as well as against individuals who may be injured by their conduct. But foreign tribunals do not regard these violations of statute law as offenses against the state, unless their vindication rests with the state itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the state, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community."

In Dicey, *Confl. Laws*, p. 220, the general proposition is laid down (as rule 40) that the high court of justice in England cannot entertain an action for the recovery of a penalty due under the laws of a foreign country, or an action on a foreign judgment for such penalty. Upon the authority of leading cases cited, the rule is then commented on as follows:

"What is a penal law? The application of rule 40 raises the difficult question, when is a law to be considered a penal law? Or, what is really the same inquiry under another form, when is an action to be considered a penal action? These inquiries are to be answered as follows: A 'penal law' is strictly and properly a law which imposes punishment for an offense against the state; and a 'penal action' is a proceeding for the recovery, in favor of the state, of a penalty due under a penal law. A law, on the other hand, is not a penal law merely because it imposes an extraordinary liability on a wrongdoer, in favor of the person wronged, which is not limited to the damages suffered by him; and an action for enforcing such liability by the recovery of the penalty due to the person wronged is not a penal action. The essential characteristic, in short, of a penal action is that it should be an action on behalf of the government or the community, and not an action for remedying a wrong done to an individual. A proceeding, then, in order to come within rule 40, must be in the nature of a suit in favor of the state whose law has been infringed."

This question of distinction between penal actions brought

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by a common informer, or on behalf of the state, to redress a public wrong, and remedial actions brought by the party injured to redress a private wrong, has been under consideration in many adjudged cases. 13 Am. & Eng. Enc. Law (2d Ed.) 52; 16 Enc. Pl. & Prac. 229, where the subject will be found fully treated, and the cases cited.

[904] It is quite obvious that no sound reason could be suggested why congress would have been concerned in prescribing a limitation to actions for penalties or forfeitures other than such as are prescribed in favor of the United States for breaches of public law, punishable by pecuniary mulct, or otherwise, at the instance of the United States. In *Campbell v. City of Haverhill*, the court said:

"Is it not more reasonable to presume that congress, in authorizing an action for infringement, intended to subject such action to the general laws of the state applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction."

This language is equally applicable to the remedy provided by section 7 of the act in question.

In examining the question of what "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," is within the purpose and meaning of section 1047, it would seem that reference may, with propriety, be made to section 919 as possibly throwing light on the inquiry, in which it is provided that:

"All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States."

The action provided for in section 7 of the act could neither be brought in the name of the United States, nor prosecuted as a popular or *qui tam* action, the remedy being expressly restricted to the party "injured in his business or property." The phraseology of the proviso in section 1047 must be regarded as somewhat significant as to the character of the prosecution within the legislative purpose.

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In view of these and other provisions of the Revised Statutes, and of the doctrine of more recent cases, it seems permissible to entertain serious doubt whether section 1047 applies, or was intended to apply, to suits other than those prosecuted in behalf of the United States. But, be this as it may, I conclude that this is not a penal action, and the recovery sought is not a penalty within the sense here involved, which is substantially the same as the international sense.

In *Brady v. Daly* the case was considered with reference to jurisdiction, as well as the statute of limitations, and the case at bar, in principle, is undistinguishable from that case, and is governed by it. Mr. Justice Peckham, giving the opinion of the court (page 154, 175 U. S., page 64, 20 Sup. Ct., page 64, Adv. S. U. S., and page —, 44 L. Ed.), said:

"The statutes, it will be perceived, all use the word 'damages' when referring to the wrongful production of a dramatic composition. No word of forfeiture or penalty is to be found in them on that subject. It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong, and to grant to the proprietor [905] the right to recover the damages which he has sustained therefrom. The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter."

The reasoning thus adopted is forcibly applicable to the cases at bar.

In *Pidcock v. Harrington* (C. C.) 64 Fed. 821, the main question was whether the anti-trust act conferred on a private person a right to sue in equity to restrain the act forbidden by the statute. It was determined that an action at law for damages was the only remedy of a private person. In analyzing the statute, Judge Coxe said:

"The first three sections are penal statutes. They give no civil remedy. Section 4 vests the right to institute proceedings in equity in the district attorneys of the United States, and, together with section 5, prescribes the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a

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public act providing no private remedy. If it ended with section 6, there would probably be no pretense that it sanctioned a suit like the one at bar. What follows, however, in no way strengthens the complainant's position. The only section which gives a private remedy is the seventh, which is as follows." Then, setting out section 7 in the very language of the statute, the court proceeded to say: "But for this section, no private person would have any standing in court, and, as the only right conferred by it is the right to sue for damages in a court of law, it follows that the point presented by the demurrer is well founded. The precise question was decided in favor of the views here expressed in *Blindell v. Hagan* (C. C.) 54 Fed. 40, affirmed in 56 Fed. 696, 6 C. C. A. 86."

See, also, 14 Enc. Pl. & Prac. 55.

It is insisted by plaintiffs' counsel that, in so far as the statute authorizes the recovery of damages above those actually sustained, the actions must be regarded as penal. As, undoubtedly, the chief object of this section of the statute is remedial and protective, the fact that damages above actual compensation are allowed would not change the real character of the action. In many civil actions for the redress of private wrongs, exemplary or punitive damages may be allowed by the court or jury, but this does not make the action penal. As was said by the supreme court of the United States in *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463:

"The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress if the private interest were not supported by the imposition of punitive damages."

In suits for the infringement of patents in the event a verdict is rendered for the plaintiff, the court is expressly authorized to enter judgment for any sum above the amount found by the verdict as actual damages, not exceeding three times the amount of the verdict, together with the costs (Rev. St. § 4919); and under section 4921, a court of equity, when exercising jurisdiction, is empowered in like manner to increase the damages found; the statute providing:

"And the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case."

[906] Nevertheless, *Campbell v. City of Haverhill* was an action on the case for infringement of letters patent, in which it was adjudged that the statute of limitations of the several states applied to such actions, and the suggestion that the

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action was penal evidently did not occur to counsel or the court.

Another view affecting the proper interpretation of the statute should be mentioned in closing the discussion of this point in the case. Section 3 of the statute declares unlawful and prohibits every trade combination or trust contract, and inflicts punishment for a violation of the statute by enacting that:

"Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, ~~shall be punished by fine not exceeding five thousand dollars~~, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

It would be unusual to discover that a statute inflicted punishment for infringement of its provisions by fine and imprisonment, or either, and again in the form of pecuniary penalty for the same act. A sound rule of interpretation would be that when a statute inflicts punishment by way of fine and imprisonment at the suit of the state for a public wrong affecting the whole community, and also confers a remedy on a party for private injuries resulting from breaches of the statute, the latter will not be regarded as a penalty unless the statute so declares. It was accordingly so decided by the supreme court of Ohio in *Railway Co. v. Methven*, 21 Ohio St. 586. A statute providing for a fine or penalty usually either fixes the amount, or prescribes maximum and minimum limits within which the amount must be fixed by the court or jury, as the punishment, and the amount bears no direct relation to damages sustained by private injury. The amount of damages which may be recovered in the remedial action afforded by section 7 of the act in question is determined by the injury sustained, and the actual compensation therefor increased to treble that amount. The damages actually claimed here in the first case are laid at the sum of \$50,000, and in the second \$20,000. The great disproportion between these sums and the maximum limit of the fine imposed by section 3 is a circumstance admitting of no rational explanation, if the damages recovered under section 7 must be regarded as a penalty inflicted as punishment, like the fine imposed under section 3. These and other characteristic points of difference between

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penal and remedial actions support the conclusion arrived at that these actions are remedial and compensatory only.

The question now remains whether the statute of limitations of the state relied on is applicable to these actions, or actions of the class to which they belong. The statute (Shannon's Code, § 4166) expressly declares the legislative purpose and intent to prescribe a bar to "all civil actions other than those for causes embraced in the foregoing article," the limitation of real actions having been provided in the preceding article. Sections then follow prescribing a period of limitation to various suits, such as actions for injuries to the per- [907] son, and statute penalties, among which is section 4470, which reads as follows:

"Actions for injuries to personal or real property; actions for the detention or conversion of personal property, within three years from the accruing of the cause of action."

The words "personal and real property" are by the Code itself (section 63) thus defined:

"The word 'property' includes both personal and real property; the words 'personal property' include money, goods, chattels, things in action, and evidences of debt; 'real estate,' 'real property,' 'lands,' include lands, tenements and hereditaments, and all rights thereto and interests therein, equitable as well as legal."

A definition of "personal property," as given by a critical writer, and fully sustained by authority, is in these words:

"Personal property includes every kind of chose in action, using that term in its very widest sense. It includes, that is to say, every movable which cannot be touched, or intangible movable. Thus it includes 'debts,' in the strict sense of the term, and also everything (not an immovable) which can be made the object of a legal claim; as, for example, a person's share in a partnership property." Dicey, *Confl. Laws*, p. 313.

See, also, 1 Schouler, *Pers. Prop.* (3d Ed.) 2-17.

It will be observed that by the very terms of the act of congress, the remedy of a suit to recover damages is only conferred on "any person who shall be injured in his business or property." The suits in these cases must, therefore, necessarily be construed as actions to recover damages for an injury to "business or property."

The plaintiff in the first-named case is engaged in no business whatever, and the plaintiffs in the second case are engaged in the business of taking contracts to furnish and

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place in position pipes and fittings. They do not deal in or handle pipes and fittings as merchants or dealers would do. It will admit of question whether, in an action under the statute for an injury to business alone, it would not be necessary for a plaintiff to allege that he was engaged in interstate trade or commerce, in order to come within the protection of the act. *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* (C. C.) 55 Fed. 851; *Bishop v. Preservers' Co.* (C. C.) 51 Fed. 272. In *Lowry v. Association* (C. C.) 98 Fed. 817, facts are disclosed which, in respect of both the character of business and method of injury to such business, bring the case within the anti-trust act. However, the injuries alleged in the declarations as grounds for recovery are not injuries to any business in which the plaintiffs were engaged. The suits are clearly for the recovery of the difference between the fair market value of the goods purchased and the unlawful prices arbitrarily fixed by the trust combination; or, stated in another form, the suits are to recover back, as damages, the sums of money unlawfully demanded and paid, increased threefold by the express direction of the act. Now, money has been declared to be personal property, not only by state statute, but again and again by text writers and in judicial statement. Confessedly, the declarations present no case of an injury to property at all unless it is personal property. I am unable to perceive that the actions are for injuries other than to personal property.

[908] The contention, finally, is that section 4470 of Shannon's Code of Tennessee is applicable only when the injury is direct. Such an interpretation would disregard all progress, and carry us back to the old action of trespass. Before the reformed code systems of pleading adopted in most of the states, the action on the case had, by wide application, become the remedy of every wrong or injury to personal property to which trespass would not apply. Trespass upon the case would lie for every civil wrong to chattels personal, whether corporeal or incorporeal, and whether the injury was direct and immediate or indirect and consequential. And. Steph. Pl. § 52; Bish. Noncont. Law, § 45; Cooley, Torts (2 Ed.) 510; Poll. Torts (5th Eng. Ed.) pp. 13, 22,

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495. See, also, *Carrol v. Green*, 92 U. S. 509, 23 L. Ed. 738; *Railway Co. v. Clark*, 38 U. S. App. 573, 20 C. C. A. 447, 73 Fed. 76, 74 Fed. 362; *Cockrill v. Butler* (C. C.) 78 Fed. 679. No valid reason could be suggested for a construction of the statute which would restrict its application within such narrow limits in view of the wide and various applications of actions on the case. The words of the statute, "actions for injuries to personal or real property," are general, and in no wise restricted by the specific mention of actions for detention or conversion. If, indeed, money unlawfully obtained as alleged in these declarations is not a direct injury, the civil wrong belongs to a class for the redress of which trespass on the case had been a long-used remedy at the time of the adoption of the Code. In 1 Add. Torts (6th Ed.) § 27, it is said:

"If one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money is, in contemplation of law, not the money of the wrongdoer, but of the injured person, whose title to it cannot be destroyed and annulled by the fraudulent and unjust dispossession."

The author then, declaring that an action will lie to recover back money paid under such conditions, continues:

"Such an action also lies against all persons who extort money for doing what they are by law bound to do without payment or reward, or who receive, and have in their possession, and wrongfully detain, the money of another; 'for,' as it has been observed, 'no man will venture to take, if he knows he is liable to refund.'"

The doctrine is supported by reference to cases in which it was decided that money may be recovered back when wrongfully paid under different circumstances. Thus, excessive charges demanded by a carrier of goods for transportation, and paid by the consignee in order to get possession, would support an action to recover back the excess. So, of money paid under the coercion of threatened litigation, or money unlawfully demanded and received by a revenue officer for the release of goods seized, or other like payments wrongfully demanded and taken. In 2 Greenl. Ev. (16th Ed.) § 224, the distinction between an action of trespass and an action on the case is stated clearly, and in the fewest words possible, thus:

"By the former, redress is sought for an injury accompanied with actual force; by the latter, it is sought for a wrong without force."

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[909] And in reference to the character of the injury which would support an action on the case it is further observed:

"So, though the property was forcibly taken, the force may be waived, and trover, which is an action on the case, may be sustained, for the value of the goods." *Id.* § 226.

The extended use of the action of trespass on the case is well indicated by the following definition, which has been generally accepted as accurate:

"The writ of trespass upon the case lies where a party sues for damages for any wrong or cause of complaint to which covenant or trespass will not apply." *And. Steph. Pl.* § 52.

See, also, upon this subject, *Cockrill v. Butler* (C. C.) 78 Fed. 679, and authorities there cited.

The circumstance that an exorbitant price for a commodity arbitrarily fixed by a trust combination is demanded and received through the medium of a contract of purchase in no wise affects or changes the real nature of the injury as an unlawful taking and detention. "The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. Where the harm that ensues from the unlawful act or omission is the very kind of harm which it was the aim of the law to prevent (and this is the commonest case), the justice and necessity of this rule are manifest without further comment." *Poll. Torts* (5th Ed.) p. 23.

In *Conk v. Railroad Co.*, 1 Tenn. Cas. 409, possession of the goods was obtained through a contract for transportation, and the action was for the value of the goods. "The action," said the supreme court, "is for the detention or conversion of the plaintiff's property. It is true, the contract for carrying the goods is averred, and that the defendant failed to comply with it. Yet the gist of the action is the detention or conversion of the property, by which it was lost to the plaintiff." It was held that three years was the limitation.

In the light of this exposition of the law in respect of the form and proper application of the older and well-defined remedies, the inquiry into the legislative purpose disclosed in the section of the Code with which I am dealing ought not to

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involve a question of interpretation which will not admit of satisfactory answer. The Code of 1858 is a systematic compilation enacted as such, every part of which must be read in view of this circumstance, and not as an independent enactment. Forms of actions were abolished by the Code, and the statute of limitations does not depend on the form, but on the cause, of action. *Conk v. Railroad Co.*, 1 Tenn. Cas. 409. In construing the words "actions for injuries to personal or real property," as found in section 4470, it seems allowable to refer to sections 4437 and 4438 in the preceding chapter, under the same title, both chapters belonging to part 3 of Shannon's Code, which treats "Of the Redress of Civil Injuries." In the sections last referred to the Code undertakes to deal with all actions in the well-recognized classes of actions ex contractu and ex delicto, and to completely abolish forms of action. Section 4437 declares that "all contracts may be sued on in the same form of action," and section 4438, dealing with the general subject of torts, provides that "all wrongs and injuries to the property, in which money only is demanded as damages, may be redressed by an action on the facts of the case." No valid reason could be offered to support an interpretation which would give to the words "actions for injuries to personal or real property," in section 4470, a meaning more restricted than the sense in which the words "all wrongs and injuries to the property" are used in section 4438. It is hardly to be doubted on any substantial ground that the legislative purpose in both sections was to include and provide for every species of injury to personal property included in the more general or collective name of torts or civil wrongs. The new remedy provided by congress must be enforced just as like actions within the same jurisdiction (*Campbell v. City of Haverhill*; *Cockrill v. Butler*), in accord with Rev. St. § 914. The actions are, therefore, prosecuted according to Shannon's Code Tenn. § 4438, as actions "on the facts of the case"; and, agreeably to Rev. St. § 721, as expounded in the cases last cited (also, *Brady v. Daly*), the state statute of limitations furnishes the rule of decision.

Having regard to the real nature and purpose of the actions, I conclude that they are suits for an injury to personal

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property, and within section 4470 of the state statute of limitations prescribing a period of three years as a bar to such suits. It follows, of course, that section 4469 is inapplicable. Accordingly, the demurrer as to the second plea is sustained, and as to the third plea overruled.

[594] GIBBS v. McNEELEY ET AL.^a

(Circuit Court, D. Washington, W. D. June 8, 1900.)

[102 Fed., 594.]

MONOPOLIES—ACTION UNDER ANTI-TRUST LAW—PLEADING.—A complaint in a civil action, based on the anti-trust law of 1890, alleging an illegal combination by defendants in restraint of trade, is fatally defective, where it fails to show that plaintiff has suffered damage by reason of such combination.^b

SAME—ILLEGAL COMBINATIONS WITHIN THE STATUTE—RIGHT OF ACTION FOR DAMAGES.—An association of manufacturers of shingles within a particular state, formed for the purpose of securing concerted action between its members to prevent overproduction and establish uniform prices and grading, is not an illegal combination in restraint of interstate or foreign commerce, with the meaning of the anti-trust law of 1890, or subject to federal control; and the fact that through the action of the association the mills of its members were closed for a certain time, and the price of shingles was raised, but not to an extent alleged to be unreasonable or exorbitant, does not give a dealer in shingles for export a right of action against it or its members under such law.

SAME.—The action of an association of manufacturers in adopting a resolution denouncing a dealer in the product they manufactured, who bought and shipped such product to customers in other states and foreign countries, and in printing such resolution in circulars, and mailing the same to other manufacturers and customers of the dealer, whereby his business was injured, constituted an illegal combination or conspiracy in restraint of interstate and foreign commerce, and gives the person injured a right of action in a circuit court of the United States, under the anti-trust law of 1890, to recover the damages sustained.

^a Verdict for defendants directed by Circuit Court (107 Fed., 210). See p. 71. Reversed by Circuit Court of Appeals, Ninth Circuit (118 Fed., 120). See p. 194.

^b Syllabus copyrighted, 1900, by West Publishing Co.

*Cf.
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Action to recover damages claimed on account of an unlawful combination to restrain interstate and foreign commerce, and a conspiracy on the part of the defendants to establish and control prices of the product of the mills employed in manufacturing red-cedar shingles, in the state of Washington, and to limit the production of red-cedar shingles so as to prevent demoralization of the market by overproduction, and also to recover damages alleged to have been caused by the defendants and others, forming an unincorporated association of shingle manufacturers under the name and style of the Washington Red-Cedar Shingle Manufacturers' Association, by the circulation through the mails and publication of false and defamatory statements concerning the plaintiff, and intended to injure him in his business as a buyer and exporter of red-cedar shingles. Demurrer to complaint overruled.

T. O. Abbott, for plaintiff.

Bates & Murray, for defendants.

HANFORD, District Judge.

The plaintiff's amended complaint sets forth four separate causes of action. The material allegations to be considered may be condensed into a few sentences. The plaintiff shows that for several years he was engaged in business at Tacoma, in the state of Washington, as a buyer and exporter of red-cedar shingles; that red-cedar shingles are a staple article of manufacture in the state of Washington, the market for which is mostly in other states and in Canada; that the defendants, and other persons, firms, [595] and corporations named in the complaint, are manufacturers of red-cedar shingles, owning and operating mills in several different places in this state, and that they have formed and constitute an unincorporated association having for its object the prevention of injurious competition, and that the organization and maintenance of said association is in violation of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (1 Sup. Rev. St. [2d Ed.] 762). For a second cause of action the complaint alleges, in addition to

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the matters already recited, that the association has established prices for red-cedar shingles below which members are not allowed to sell, said prices being a little higher than the market prices prior to the formation of the association; that the plaintiff's customers refused to buy at the prices fixed by the association, causing him damage in the loss of trade to the amount of \$1,200. For a third cause of action the complaint alleges, as additional matter, that the association caused all the shingle mills owned and operated by its members to shut down for a period of 60 days for the purpose of preventing an oversupply, and that by restricting the production of red-cedar shingles the plaintiff sustained further damages by loss of trade to the amount of \$1,000. For a fourth cause of action the plaintiff charges that the defendants and other members of the association, with intent to injure the plaintiff and to destroy his business, at a meeting of the central committee of the association, adopted certain resolutions containing false and defamatory statements concerning the plaintiff, charging that the plaintiff was endeavoring to injure the market for Washington red-cedar shingles; that plaintiff had no money invested in his business as a dealer in shingles; that he was without credit, and was irresponsible, and was not an honorable and legitimate dealer in shingles; that the officers of the association caused said resolutions containing said false and defamatory matters to be written and made a part of the records of the association, and caused the same to be printed as a circular, and to be distributed through the United States mails, addressed to each manufacturer of shingles in the state of Washington, and to various wholesale and retail dealers, including customers of the plaintiff in the United States and Canada, and to a number of newspapers and trade journals having circulation among the plaintiff's customers; that as the result of said combination and conspiracy among the defendants and other members of said association, and of the acts and things complained of, odium and discredit were cast upon the plaintiff, and his customers thereafter refused to buy shingles of him, and the manufacturers of shingles who theretofore had transacted business with him refused

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to sell shingles to him, and by that means his business was totally destroyed, to his damage in the sum of \$15,000.

1. The complaint in its statement of the first cause of action is radically defective, in this: that it does not allege that any damage has resulted to the plaintiff from the acts complained of, and for that reason the demurrer will be sustained.

2. The gist of the second cause of action is that the plaintiff has been damaged by diminution of trade in consequence of the action of the association in raising the price of shingles; and the third cause of [596] action is similar, the complaint being that a shrinkage of the plaintiff's business was caused by the action of the association in suspending the operation of mills controlled by it, so as to prevent an overstocking of the market. Both of these causes of action appear to be predicated upon a notion that because the plaintiff was a buyer and exporter of shingles he had a vested right to the benefit of unrestrained competition for trade among manufacturers, and that the plaintiff has a vested right at all times to have a surplus of shingles on the market so that he may enjoy that advantage in buying to supply the demands of his customers, and that by depriving him of these benefits and advantages the association has committed a legal wrong, and deprived him of valuable property rights, for which he is entitled to recover damages. There is no allegation in the complaint that the price of shingles fixed by the association is higher than the reasonable price, considering the necessary cost of production, and allowing something for the value of the timber to the owners of the land upon which it grows, and a reasonable profit to the manufacturers, nor that the wants of consumers have not been promptly supplied. On the contrary, the pleader has boldly advanced the selfish theory that, unless conditions are maintained so that a middleman or speculator may operate with profit to himself, he has a right to compensation in damages from the owners of mills who refuse to operate for his benefit, or to sell the product at prices satisfactory to him, regardless of losses which may result to them from such operation. It is a well-known and lamentable fact that for half a century loggers have been permitted to cull the magnificent

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forests of this state, wasting the greatest of her natural endowments, by cutting fir and cedar trees recklessly, sending only the best logs to the mills to be manufactured into lumber for shipment to market in distant states and countries, leaving the residue to decay upon the ground, or give additional energy to the destructive force of forest fires in the summer months. They have paid but little for stumpage, and frequently their hired laborers have been defrauded of their wages. Unrestrained competition has been the means by which this state has been stripped of its wealth. Cedar trees standing and growing in our forests are a blessing to the state, and they ought to be preserved, at least until their value is appreciated, so that the crop which has required many centuries of time for its perfection will be worth to owners of the land something more than the price which a farmer may reasonably expect for his annual production. It seems ridiculous that while land producing wheat, hay, vegetables, or fruit in this state usually brings annual returns over and above expenses of cultivating and harvesting of from \$10 to \$50 per acre, the average market price for a fee-simple title to timber land in western Washington has never yet been above \$10 per acre. An association which will check the wanton destruction of cedar trees in this state, by reckless lumbermen, for the benefit of speculators, instead of being condemned, deserves the gratitude of the commonwealth. No principle of natural justice is appealed to by that part of the complaint now under consideration, and I do not think that the act of congress commonly designated as the "Anti-Trust Law of 1890," to which the complaint refers, can be fairly construed so as [597] to make the Washington Red-Cedar Shingle Manufacturers' Association a criminal organization, so long as its operations are properly conducted, and kept within the scope of the object for which the association was formed, as set forth in its constitution, the first article of which reads as follows:

"The title of this organization shall be the Washington Red-Cedar Shingle Manufacturers' Association, and its object shall be to secure a full understanding of the conditions surrounding the red-cedar shingle market throughout the United States; the establishing of uniform rules for grading and manufacturing; the establishing of uniform rates and prices; and for purpose of carrying out such other measures as

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may be deemed for the welfare and in the interest of the manufacturers of red-cedar shingles."

There is in this declaration no hint of a purpose to create a monopoly, or to place any burden upon interstate or foreign commerce. The association, judged by the instrument which defines its object and circumscribes its powers, is innocent of any wrong intent, because its object is to influence the conduct of its members, and not to assail the rights of others. Concert of action for mutual protection among farmers or craftsmen or miners whose operations are entirely within the state may indirectly affect the prices or the abundance of commodities brought for sale within the state by importers, as well as commodities produced within the state for sale elsewhere; but associations of persons not themselves engaged in interstate commerce, having no object other than to protect their own rights and serve their own interests in business operations wholly confined within the state, cannot be held to be amenable as violators of the anti-trust law, which is necessarily so limited as to reach only combinations intended to prevent competition in interstate or foreign commerce.

The distinction between the business of manufacturing staple commodities for sale to whomsoever will buy, whether for home consumption or transportation to distant markets, and interstate commerce, is very clearly brought into view, and the principle upon which I intend to rest in making this decision is explained, in the opinion by Chief Justice Fuller in the case of *U. S. v. E. C. Knight Co.*, 156 U. S. 1-11, 15 Sup. Ct. 253, 39 L. Ed. 329. The sense of that decision is epitomized in the following excerpts:

"The relief of the citizens in each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with, and this court has recognized their possession of that power, even to the extent of holding that an employment or business carried on by private individuals, when it became a matter of such public interest and importance as to create a common charge or burden upon the citizen,—in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by the means of which a tribute can be exacted from the community,—is subject to regulation by state legislative power. On the other hand, the power of congress to regulate commerce among the several states is also exclusive. The constitution does not provide that interstate commerce shall be free, but, by the grant of this legislative power to regulate it, it was left free except as

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congress might impose restraints. * * * 'Commerce undoubtedly is traffic,' said Chief Justice Marshall; 'but it is something more; it is intercourse. * * * That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state.' *Gibbons v. Ogden*, 9 Wheat. 189-210, 6 L. Ed. 23; *Brown v. Maryland*, 12 Wheat. 419-448, 6 L. Ed. 678; *License Cases*, 5 How. 505-599, 12 L. Ed. 256; [598] *Mobile Co. v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Bozman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *In re Rahrer*, 140 U. S. 545-555, 11 Sup. Ct. 865, 35 L. Ed. 572. * * * Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not a primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. * * * The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state, and belongs to commerce. * * * Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade; but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy. * * * It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such, or to limit and restrain the right of corporations created by the states or citizens of the states in the acquisition, control, or disposition of property, or to regulate or prescribe the price or prices at which such property or the product thereof should be sold, or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted."

See, also, *Kidd v. Pearson*, 128 U. S. 1-26, 9 Sup. Ct. 6, 32 L. Ed. 346.

The more recent decision of the supreme court in the case of *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211-248, 20 Sup. Ct. 96, Adv. S. U. S. 96, 44 L. Ed. —, does not conflict with the decisions above cited. That case is to be distinguished from the one under consideration by the fact that it involved an agreement between manufacturing firms and corporations located in several states, binding themselves to refrain from all competition with each other for

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the sale of iron pipe in the 36 states and territories named in the agreement.

The history of the hop industry in this state may be referred to as an illustration. There was a time when the production of hops was a favorite industry in this state, but during several years past it has grown more and more into disfavor because it has been unprofitable, and interstate commerce in this commodity has been diminished by reason of the conversion of many hop fields into meadows and vegetable gardens. It may be true that the hop farmers, acting individually and without advice from any one, have, one after another, converted their hop fields; but if they had joined an association of farmers who for general welfare had adopted efficient measures to obtain true information with regard to the supply and demand for hops and other products of the state, and had conformed to an intelligent resolution of the association to meet an increasing demand for onions, potatoes, and hay, instead of continuing to lose the value of their labor and the use of their farms, year after year, by producing [599] hops in excess of the requirements of the market, it would certainly be tyrannical for the courts to punish them for resulting losses of profit by dealers and speculators in hops. In my opinion, it would be equally absurd to apply coercive measures to compel shingle manufacturers to operate their mills without profit to themselves, or to forbid them to have the benefit of co-operation for their own advantage. The demurrer to the second and third affirmative defenses will be sustained on the ground that the object of the association is not unlawful. The anti-trust law was not intended to oppress any class, and it cannot be so construed as to prohibit the right of manufacturers, whether acting individually or in concert, to be prudent, and use common sense in maintaining reasonable prices, and avoiding losses by overproduction.

3. According to the statement of the fourth cause of action, the association appears to have been used for a purpose not suggested by its constitution, and highly prejudicial to the plaintiff. In my opinion the complaint states a good cause of action to recover damages for libel, and the only

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question as to the right of the plaintiff to maintain the action in this court is whether the facts alleged make a case of which jurisdiction is given to this court by the terms of the anti-trust law. The first and second sections of the act declare contracts, combinations, and conspiracies in restraint of trade or commerce among the several states or with foreign countries, and all attempts of persons to monopolize interstate and foreign commerce, to be illegal, and the seventh section reads as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fees."

It is essential to a right of action pursuant to this law to show that the defendants have entered into a combination or conspiracy to restrain or monopolize interstate or foreign commerce, and that the plaintiff has been injured in his business or property by an act of the defendants pursuant to their agreement with each other, and intended to affect interstate commerce, and the injury must be of a pecuniary nature, involving a loss of business or damage to property. I find that all the requirements of the statute are met in the plaintiff's statement of his fourth cause of action. He does directly and positively charge that the defendants have entered into a combination to restrain interstate and foreign commerce, and constitute an organization; that at a meeting of the central committee, controlling the affairs of the association, a resolution denouncing the plaintiff was adopted, and recorded, so as to be preserved in the records of the association; that said resolution was printed and widely distributed as a circular, and especially directed to persons, firms, and corporations in the state of Washington, and in other states, and in Canada, with whom the plaintiff had theretofore transacted business as a buyer and exporter of shingles. The resolution was obviously intended to create a prejudice against the plaintiff, and to have the effect to impair his credit, [600] and to destroy his business, by in-

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ducing his customers to forsake him; and the claimant alleges that the plaintiff has been injured in his business by reason of what the defendants have done in pursuance of their unlawful combination against his business. The resolution is not a regulation of the conduct of the association or its members, and they were not minding their own business when they adopted it, but is an agreement on their part to assail the character of a man engaged in interstate commerce, for the purpose of crippling him as a competitor for trade. By annihilating a man of experience and skill in a particular branch of commerce, the restraint upon commerce is quite as effectual as would be any contract binding him to abstain from competition.

Demurrer to fourth cause of action overruled.

[93] UNITED STATES EX REL. GRIGGS, ATTY. GEN., ET AL. v. CHESAPEAKE & O. FUEL CO. ET AL.^a

(Circuit Court, S. D. Ohio, W. D. August 31, 1900.)

[105 Fed., 93.]

cf. application code MONOPOLIES—CONTRACTS AFFECTING INTERSTATE COMMERCE.—A contract by which a corporation agrees to take the entire product of a number of persons, firms, and corporations engaged in mining coal and making coke in a certain district, which is intended for "Western shipment," to sell the same at not less than a minimum price, to be fixed by an executive committee appointed by the producers, and to account for and pay over to such producers the entire proceeds above a fixed sum per ton, to be retained as "compensation,"—the stated purpose being "to enlarge the Western market,"—and under which the shipments are made into other states, is one affecting interstate commerce, and is subject to the provision of the anti-trust law.^b

SAME—ANTI-TRUST LAW.—It is the declared policy of congress to promote individual competition in relation to interstate commerce, and to prevent combinations which restrain such competition between their members; and it is no defense to an action to dissolve such a

^a Affirmed by Circuit Court of Appeals, Sixth Circuit (115 Fed., 610). See p. 151.

^b Syllabus copyrighted, 1901, by West Publishing Co.

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combination as illegal under the anti-trust law that it has not in fact been productive of injury to the public, or even that it has been beneficial, by enabling the combination to compete for business in a wider field.

SAME—COMBINATION IN RESTRAINT OF TRADE.—By a contract between a fuel company and an association composed of 14 persons, firms, and corporations, engaged in producing coal and coke in a certain district, the company was to handle for a term of years the entire output of the mines intended for the Western market, and bound itself not to sell the product of any competing mines. A minimum price at which the coal should be sold was to be fixed by the executive committee of the association from time to time, and the company agreed to pay such price, to obtain as large a profit as possible, and to account to the association for all of the same, above a fixed sum per ton, which it was to retain as compensation. The amount to be furnished by each member of the association was also to be fixed by the executive committee, and each was to receive payment at the same rate, to be based on the average price realized for the particular grade furnished during the current month. *Held*, that such provisions were in restraint of trade, and rendered the contract illegal, under the anti-trust act of July 2, 1890 (26 Stat. 209), in so far as it related to interstate commerce.

In Equity. Suit to annul a contract and to dissolve a combination as illegal under the anti-trust law.

Wm. E. Bundy, United States Attorney, and *Sherman T. McPherson* and *Edward P. Moulinier*, Assistant United States Attorneys.

Paxton & Warrington, *Brown*, *Jackson & Knight*, *St. Clair*, *Walker & Summerfield*, and *Richard P. Ernst*, for defendants.

THOMPSON, District Judge.

This suit was brought by the United States district attorney for this district, by direction of the attorney general of the United States. The bill alleges that the defendants, other than the Chesapeake & Ohio Fuel Company, 14 in number, are producers and shippers of coal, and that some of these are makers and shippers of coke in the counties of Fayette and Kanawha, in the state of West Virginia, in what is known as the "Kanawha District," and that they produce nearly if not all of the coal, and make nearly if not all

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of the coke, shipped from said district; that a [94] great portion of the coal and coke so produced and made is shipped for sale and consumption into the states of Ohio, Kentucky, Indiana, Illinois, Michigan, Minnesota, Montana, and the Dakotas; that prior to the 15th of December, 1897, each of the defendants, other than the Fuel Company, sold their product in the several states mentioned without any restriction other than the natural and necessary competition between themselves and others, but that on that day they entered into a contract and combination in the form of a trust and conspiracy in restraint of trade and commerce among the several states mentioned, in regard to the sale and production of coal and coke, of which the following is a copy:

"This agreement, made this 15th day of December, 1897, between the C. & O. Fuel Company, a corporation created, organized, and existing under and pursuant to the laws of the state of West Virginia, and hereinafter called the 'Fuel Company,' of the first part, and the St. Clair Company, a corporation of West Virginia; John Carver and Enoch Carver, partners in business under the firm name and style of Carver Brothers; W. R. Johnson, M. T. Davis, doing business as M. T. Davis & Co.; John Carver and Enoch Carver, partners in business under the firm name and style of the Mecca Coal and Coke Company; S. H. Montgomery, doing business under the name of the Montgomery Coal Company; the Chesapeake Mining Company, a corporation of West Virginia; the Belmont Coal Company, a corporation of West Virginia; the Kanawha Splint-Coal Company, a corporation of West Virginia; the Robinson Coal Company, a corporation of West Virginia; Harry B. Smith, special receiver of the Lens Creek Coal and Coke Company; Joseph Renshaw, special receiver of the Big Black Band Coal Company; the Charlmore Coal Company, a corporation of West Virginia; and Robert Brabbin, Jr., and L. N. Perry, partners in business under the firm name and style of the Brabbin Coal Company; Jasper McCallister, Samuel Moore, and James Kelsoe, doing business as McCallister & Co.,—and together constituting the C. & O. Coal Association, and hereinafter collectively mentioned as the 'Coal Association,' of the second part: Whereas, the members of the said Coal Association are all miners and shippers of coal, and part of them makers and shippers of coke, on the line of the Chesapeake & Ohio Railway, in Fayette or Kanawha counties, West Virginia, and have formed and organized said association for the promotion of their common business interests in the mining of Kanawha coals and cokes; and whereas, the said Fuel Company has been incorporated and organized for the purpose of placing said Kanawha coals and cokes upon the Western market, its prime object to promote the sale of, and enlarge the Western market for, said coals and cokes: Now, therefore, this agreement witnesseth:

"(1) That the parties of the second part agree, in consideration of the covenants and agreements on the part of the party of the first part herein contained, each firm, individual, or corporation severally, for themselves, himself, or itself, and not for any other, and each of them doth hereby agree, to sell to the said Fuel Company exclusively the entire coal and coke output of the mine or mines operated by each of

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them respectively on said C. & O. Ry., or branches thereof, for Western shipment, for a period of not less than five years from and after the date of January, 1898, subject to all the provisions, terms, and conditions hereinafter contained, except as to such coal as may be sold by any member of said Coal Association to the Chesapeake & Ohio Railway Company for the consumption of said railway company, which said coal such member shall have the right to sell to said railway company direct, it being understood that this contract applies only to the coal and coke to be sold west of the respective mines of the members of said Coal Association, and shall not in any way apply to or interfere with the Eastern trade of the members of said association.

"(2) The minimum price f. o. b. mines of all the various grades of coal and coke sold and to be shipped West by the members of said association, and embraced in this contract, shall be fixed by the executive committee of said Coal Association from time to time, as it shall see proper, after consultation with the executive committee of the Fuel Company. The said Fuel Company [95] covenants, agrees, and binds itself that it will make no contract for the sale of any coal or coke of any members of said association at a price lower than such minimum prices to be fixed by such committee, and, further, that it will at all times endeavor to obtain the maximum price for such coal and coke. It is understood and agreed that the minimum prices hereinbefore mentioned are net prices f. o. b. mines, and not including any profit to the said Fuel Company, which is to get its profit over and above said prices.

"(3) That the said Fuel Company shall make its sales direct, and shall not make any contract for the sale of coal and coke to a third party in the name of any member of the said Coal Association, and shall have no right by any contract to bind any member of said association to any third party, except for river business, as hereinafter provided for.

"(4) The executive committee of said Fuel Company, who shall administer and have charge of its affairs, shall be composed of three (3) persons, one of whom shall at all times be a member of or officer of a member of said Coal Association, and shall from time to time, according to the by-laws or articles of association of said association, be designated as a member of such executive committee, and shall thereupon be appointed such member of such executive committee by said Fuel Company in the place and stead of the member of or officer of a member of said Coal Association previously occupying such office. The executive committee of said Coal Association shall consist of three members of or officers of members of said Coal Association, to be selected as such from time to time by the members of said Coal Association according to their by-laws or articles of association.

"(5) The said Fuel Company covenants, agrees, and binds itself to sell for shipment by rail via the said Chesapeake & Ohio Railway, and pay for to the members of said Coal Association as hereinafter agreed, not less than 600,000 tons per annum of coal and 75,000 tons per annum of coke; such sales and shipments to be disposed of in as nearly equal monthly quantities as possible. But in case said Fuel Company is unable for any time to make sales of coal or coke by reason of the failure or inability of the members of said association to make prices sufficiently low to enable said Fuel Company to meet the prices in the market where said coal or coke is sought to be sold, and to compete with other sellers of coal or coke in such markets, then there shall be an abatement of the minimum amount of coal or coke hereinbefore agreed to be taken annually by said Fuel

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Company, bearing the same proportion to such minimum amount of coal or coke as such time during which such inability to meet such market prices shall continue does to one year. The executive committee of said Coal Association shall, not later than the 20th day of each month, designate the percentage of the total product of each class and grade of coal and coke which they deem best to be shipped by each member of said association by rail as aforesaid during the succeeding month, which apportionment so made shall be furnished the general manager of said Fuel Company not later than the 20th day of said first-mentioned month, and all orders received to be shipped by rail as aforesaid during such succeeding month shall be distributed between the members of said Coal Association by said general manager according to such apportionments: provided that, if any member of said Coal Association shall be unable or shall not desire to ship West the full amount of any kind or grade of coal or coke apportioned to such member for any month, the said Fuel Company shall distribute the order for the deficiency so caused among the other members of said association who are shippers of such grade of coal or coke, in the proportion as between such other members fixed by said committee for such month: provided, further, that only actual inability shall excuse a member of said association from shipping so much of the apportionment for any month [as (?)] shall be required by the said Fuel Company for contribution to contracts previously taken by said Fuel Company.

"(6) The said Fuel Company shall make and render to the members of the Coal Association accurate and complete reports of all coke and coal shipped by rail as aforesaid, as follows: (a) A daily report of all sales, showing the net prices of such sales. (b) A monthly report showing the tonnage of the various kinds and grades of coal and coke shipped by members of said Coal Association and weighed during the month, or weighed during such month though shipped during a preceding month, together with the average price [96] for each grade or kind of coal or coke so shipped and weighed, which average price shall be computed upon the basis of the actual price, less gross profits, if any, received for all coal or coke sold, and the minimum price, fixed as hereinafter provided, for such month for coal or coke not sold in such month; said report to be made not later than the 10th day of each month for all coal and coke weighed, or weighed during the previous calendar month. The coal and coke shipped and weighed or weighed during such month shall be paid for by said Fuel Company to the members of said Coal Association according to the average prices, determined as aforesaid, and upon the sale after the end of each month of any coal or coke shipped and weighed, or weighed but not sold during such month, the surplus, if any, arising after deducting from the actual price received the minimum price for such kind and grade of coal or coke for such month and profit shall be paid forthwith to the shippers of such grade of coal or coke for such month according to their tonnage of such kind or grade of coal or coke for such month. And the said Fuel Company agrees and binds itself to pay as aforesaid, in cash, on or before the 20th day of each month, for all coal and coke during the previous calendar month.

"(7) The said Fuel Company further covenants, agrees, and binds itself to handle only such coal and coke as are produced by the above-mentioned members of said Coal Association, and not to handle, buy, or sell, for itself or on commission, any coal or coke produced by any other operator along said Chesapeake & Ohio Railway or branches thereof, or any coal or coke wherever produced, of the same grade as, or competing with, coal or coke produced by any of the members

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of said association, the prime object of this contract being to enlarge the sale of, and extend the Western market for, Kanawha coal and coke; and this shall not prevent the said Fuel Company from dealing in anthracite coal or New River coal or coke: provided, that New River coal or coke shall not be dealt in to the prejudice of, or sold as a substitute for, Kanawha coals and cokes: and provided, further, that in an emergency, and when absolutely necessary, other coals and cokes may be handled by said Fuel Company to meet such emergency. But no dealing in such anthracite, New River, or other coal or coke shall be done by said Fuel Company to an extent or in a manner incompatible with the prime object of this agreement, as hereinbefore recited.

"(8) That at any time, by a vote of two-thirds ($\frac{2}{3}$) of the members of said Coal Association, said Fuel Company may be allowed to handle any other coal or cokes for such time and upon such terms and conditions as may be prescribed by such vote.

"(9) The said Fuel Company is to receive a gross profit on all rail coal and coke sold, which shall not exceed ten (10) cents per ton of two (2,000) thousand pounds on any sale, which compensation shall be retained by said Fuel Company out of the monthly settlements of coal and coke sold; the true intent and meaning of this clause being that the Fuel Company shall get its profit over and above the net minimum price of said coal and coke f. o. b. mines as hereinbefore fixed, and, if the price at which said coal and cokes is sold by said Fuel Co. shall be sufficient to yield a sum exceeding said minimum price and gross profit of ten (10) cents per ton as aforesaid, then the difference shall be paid over to the members of said association in the manner and at the time hereinbefore mentioned, as they may be entitled under this agreement, as part of the purchase price to be paid for coal and coke by said Fuel Co.

"(10) The members of said association shall not be required to mine and ship coal when hindered or prevented by causes beyond their own control, such as strikes, accidents, refusal or inability of the carrier to provide transportation, &c.

"(11) The said Coal Association shall have the right once per month, through a committee not exceeding three in number, or a person designated by said committee, to examine the order, sales, and tonnage books of said Fuel Company.

"(12) The coal or coke of members of said Coal Association shipped in barges by river shall be handled by the said Fuel Company, as an agent, on the same terms and under the same conditions as are now established or may be hereafter established and prevail in Cincinnati market for the sale of river [97] coal, but the said Fuel Company shall not make time sales or extend credit without the consent of the shippers of such coal.

"(13) All settlements for coal or coke shipped by rail as aforesaid shall be made upon the scale weights of the Chesapeake & Ohio Railway Company, as ascertained at its weighing stations now established or that may hereafter be established.

"(14) It is distinctly understood that nothing herein contained shall be construed to render the said members of said association liable as partners, in any way, manner, or form, either as between themselves or with the said Fuel Company; each of said firms, corporations, and individuals contracting herein for themselves, itself, or himself, and not one for the other.

"(15) The said Fuel Company further covenants, agrees, and binds itself that neither it nor any of its officers, employés, or servants will, with its knowledge, directly or indirectly, in any way, manner, or form, engage or become interested in the buying or selling of

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bituminous coal or coke in competition with the coal or coke of any of the members of said Coal Association, except under the terms and conditions of this agreement.

"(16) The members of said Coal Association above named, each for himself, itself, or themselves, and not one for the other, covenant and agree that the said members of said association will not sell or consign any coal or coke bound to points west of their respective mines, except under the terms and conditions of this agreement, during the period covered by this agreement, and that there shall be no pretended sale or lease of the property of the members of the said association made to evade this contract; but it is further understood and mutually agreed that this contract shall not be construed to prevent any bona fide sale, assignment, or lease of the respective properties operated by the members of said association, respectively, or the interest therein of any member of said association. And in case of such sale, assignment, or lease, the members of said association are not to be held responsible under this contract for the sale and delivery of any coal from such properties after such sale, assignment, or lease takes place. But in case the vendee, assignee, or lessee of any coal or coke property of any member of the Coal Association desires, he shall have the right to take the place of such member in this agreement.

"(17) And whereas, some of the members of said association have contracts for the sale of coal or coke, which cannot be completed until after this agreement goes into operation; and whereas, it is to the advantage both of such members and of said Fuel Company that such contracts be filled through said Fuel Company, it is further agreed that the members of said association having existing contracts to be completed during the period of this agreement shall on or before the 24th day of December, 1897, file with the general manager of said Fuel Company a memorandum of each of said contracts, and such of said contracts as are uncompleted on the first day of January, 1898, shall be completed through said Fuel Company; the Fuel Company to make no charge for its services in connection with such contract and collecting the proceeds of the same; said Fuel Company not to guaranty the collection of such proceeds, or be responsible for same unless collected by it. Such coal or coke so shipped on existing contracts shall not be taken into account in any way as a part of the traffic hereinbefore provided for in this contract, nor its prices taken into account in computing the average price for any month, but such as shall be shipped by rail shall be considered part of the minimum tonnage mentioned in the fifth clause of this agreement for the year in which it is shipped.

"(18) The said Fuel Company shall keep at its own expense one or more inspectors to examine and inspect from time to time, as often as may be necessary, the coal and coke produced, with a view of keeping up a proper standard of excellence. Should said inspector find coal or coke badly or improperly prepared, he shall immediately report all the facts in writing to the Fuel Company and to the operator preparing such coal or coke, and shipments from mine or mines producing such alleged improperly prepared coal or coke may be suspended after five (5) days' notice in writing to such operator, at the discretion of the executive committee of the Fuel Company, until such time as such operator may prepare such coal or coke properly. In any case such [98] operator shall have the right to refer the question whether such coal or coke is improperly prepared or not, or, if not so prepared, whether the same be so prepared at reasonable cost, to arbitration, as herein provided, which decision as to the preparation of such coal shall be final and binding on both parties; and in case

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said arbitration shall find such coal or coke improperly prepared, and shall further find that it is impossible or impracticable for such operator to remedy such faults at reasonable cost, he shall have the right to withdraw from, and have this agreement annulled as to him. If said Fuel Company shall make default in payment for any coal or coke shipped under this agreement according to the terms hereof, and said default shall continue for the space of fifteen (15) days, unless payment shall be withheld by reason of attachment, suggestion, garnishment, or other legal process against the member of said Coal Association on whose claim default is so made, such default shall, at the option of such member on whose claim such default it is so made, work an annulment of this contract as to such member: provided such member shall within ten (10) days after the expiration of said fifteen (15) days give notice in writing to said Fuel Company of the election of such member to exercise such right of annulment; and a failure to exercise this right for any such default shall not prevent the exercise of the same for any subsequent default. And a violation or failure to keep, observe, and perform any covenant or covenants herein contained by any party to this agreement shall, at the option of the party or parties thereby aggrieved, work an annulment of this agreement as to such party or parties on thirty (30) days' notice in writing. And no waiver of this right, in case of any violation or failure to keep, observe, and perform any covenant hereof, shall prevent the exercise of the same for any subsequent violation of, or failure to keep, observe, and perform, the same, or any other covenant hereof; provided, that upon any notice for the annulment of this agreement as hereinbefore provided being given by any parties or party, the party or parties to whom it is so given, if desiring to contest the rights of the parties or party giving said notice to annul this agreement, shall have the right to submit the question to arbitration, as herein provided, and the decision of such arbitrator shall be final and binding on all parties to such arbitration. But any withdrawal or annulment as to any member or members under this, or clause No. 18 hereof, shall not affect this contract as to the parties remaining, between themselves.

" (19) Any person, firm, or corporation now or hereafter producing coal to be shipped on the Chesapeake & Ohio Railway may become a party to this contract by signing the same, or an exact copy hereof, with the Fuel Company, or by an indorsement attached hereto may accept the provisions hereof; and, upon becoming such party hereto, such person, firm, or corporation shall be entitled to all the rights and privileges, and be subject to all the duties and liabilities, hereunder, the same as if he, it, or they had been named in said contract as one of the parties of the second part, and had duly signed and executed it with the others named therein: provided, that said association shall agree to such person, firm, or corporation becoming a party hereto by a majority vote of a quorum of its members.

" (20) It is understood and hereby agreed that in any matter or thing connected with this agreement, where any party hereto shall assert, maintain, or set up any claim, right, privilege, liability, or penalty in his, its or their favor, or against any other party or parties hereto, and thereby a controversy shall arise hereunder, then and in that event either party or parties to such controversy shall have the right to submit the said controversy to arbitration in the manner hereinafter set forth. There is hereby constituted and appointed an arbitration committee, which shall be composed of two persons and such third person as shall be by such two selected from time to time as any controversy may arise. Such two persons shall be selected as follows: Each and every year during the continuance

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of this contract the said Fuel Company shall appoint some person to serve upon said arbitration committee, and the parties of the second part shall also appoint one to serve upon said committee, of which appointment the Fuel Company and the association shall have notice, and the two persons so appointed shall continue to serve until their successors shall be appointed in the same manner. Whenever a controversy shall arise hereunder, the party desiring to submit such controversy shall notify the other party or parties to such controversy of the same, in [99] writing, and shall designate in such notice the time and place when said two arbitrators shall meet to hear the matter in controversy, and he or they shall also notify the said arbitrators to meet at said time and place. And at the time and place so designated said two arbitrators shall meet, and they shall select a third arbitrator, who, with the other two, shall constitute the full arbitration committee to hear and determine the said controversy, and whose award in all matters of law and fact shall be final, and shall be binding upon each and all of the parties to that controversy. Such notice may be served as a legal notice is served, or it may be mailed to the party, to be served at his or their post-office address. And any notice to any one or more of the parties of the second part may be served upon or sent by mail to the president and secretary of said association. If at the time and place said two arbitrators are required to meet, either one or both of them should fail or refuse to attend or serve, then the Fuel Company, by its agent or attorney, on the one side, may fill the vacancy caused by its arbitrator being absent or refusing to serve, and the association, by its officer, agent or attorney, may fill the vacancy caused by the absence of its arbitrator or his refusing to serve; and the arbitrator or arbitrators so selected by either or both of said parties as aforesaid shall select the third, which three shall, for that controversy, constitute the arbitration committee, and shall have the same powers, and their award shall be as final, as if the two arbitrators herein first provided for had attended and selected a third. If, upon having notice to attend at a time and place to settle a controversy, either party shall fail or refuse to attend, or shall fail or refuse to select an arbitrator when required hereunder so to do, the said association by its president, other officer or attorney, may select an arbitrator in the place or stead of the absent one; and, if such association shall fail or refuse to make such appointment, in that event the Fuel Company, by its agent or attorney, may make such appointment or appointments, and the two when so appointed in any of said modes shall select a third, and the three shall constitute the arbitration committee to hear and determine said controversy, whose award shall be final. A notice to arbitrate hereunder shall not fix a time longer than fifteen (15) days nor less than five (5) days from the time of giving said notice, unless by mutual consent. The place of such meeting of the arbitrators shall be at Cincinnati, Ohio, or Charleston, W. Va., unless by mutual consent. Said arbitrators shall have the right to adjourn their session from time to time or to such place or places as they may determine. And they shall make their award in not less than three days from the time the evidence is finally taken before or submitted to them; such award to be valid if signed by two of the arbitrators. Every award shall be executed in duplicate, and a copy thereof furnished to each of the executive committees herein mentioned. The failure of a regular arbitrator to attend at a time and place designated in any notice to him, and the appointment of another in his stead for any controversy, shall not for that reason vacate his general appointment as an arbitrator until his successor is appointed. If the two arbitrators appointed as above provided shall at any time

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fall or refuse for two days to appoint the third arbitrator, the latter shall be appointed by the judge of the circuit court of Kanawha county, West Virginia.

"Witness the following signatures:

- "The C. & O. Fuel Co., Donald Macdonald, Pt.
- "Robinson Coal Co., by Neil Robinson.
- "W. R. Johnson.
- "The Kanawha Splint-Coal Company, by F. E. Lair.
- "Carver Bros.
- "Enoch Carver.
- "Jos. Renshaw, Special Receiver Big Black Band Coal Co.
- "Charlmore Coal Co., Herndon & Renshaw, Mgrs.
- "McCallister & Co., per James Kelsoe.
- "Mecca Coal & Coke Co., by John Carver.
- "Chesapeake Mining Co., by J. B. Lewis.
- "Coalburg Colliery Co., by J. B. Lewis.
- "Montgomery Coal Co., by S. H. Montgomery.
- "Belmont Coal Co., by T. E. Embleton, Pt.
- "Harris B. Smith, Spl. Receiver Lens Creek Coal & Coke Co."

[100] That this contract went into effect on the 1st day of January, 1898, and that the defendants, acting thereunder, monopolized and controlled the amount of coal and coke produced in the Kanawha district, and only permitted such amount of coal to be mined and coke to be made as could be sold by the Fuel Company in accordance with the provisions of the contract, the producers being permitted to ship only such amounts as should be apportioned among them by an executive committee of three selected by members of the association; that the defendants, acting under said contract, not only controlled the amount of coal and coke shipped into the states mentioned from the Kanawha district, but wholly destroyed competition in the sale of the same. And it is alleged generally that the said contract, and the operations thereunder, constitute an unlawful combination, in the form of a trust, in restraint of trade and commerce among the said several states, and that said defendants have combined and conspired with one another to monopolize, and have attempted to monopolize, by reason of said contract, and their acts and operations thereunder, a part of the trade and commerce in coal and coke among the said several states, all in violation of the act of congress of July 2, 1890. And the prayer of the bill is that the defendants be restrained from selling or shipping any coal or coke into any state, other than the state in which they reside, under said contract, and that they be restrained from continuing in any like combination or agreement, and from further agreeing and combining and

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acting in any manner as set out in said contract, and that the contract be declared void and illegal, and that said trust and combination be dissolved by decree of the court.

At the hearing no evidence was introduced by the complainant, but the case was submitted upon the bill and answer, and the evidence introduced by the defendants. The circumstances under which the contract was made, and the facts in relation to the operations of the defendants thereunder, as shown by the allegations of the answer and the evidence, are, in substance, as follows: The defendants other than the Fuel Company are owners of coal mines and producers and shippers of coal, and some of them are makers and shippers of coke. Their mines and coke plants are situated along the line of the Chesapeake & Ohio Railway, in the counties of Fayette and Kanawha, in the state of West Virginia, and in the territory known as the "Kanawha District." The counties of Fayette and Kanawha embrace nearly all of the district. A part of Putnam county is within this district. Besides the mines of the defendants, there are in the same district, on the Chesapeake & Ohio Railway, or south side of the Kanawha river, the mines of the following companies, viz.: The Great Kanawha Colliery Company, the Mt. Carbon Company, Limited, the Diamond Mine, the Forest Hill Coal Company, the East Bank Coal & Coke Company, the Polsue Coal Company, the Coalburg Colliery Company, the Stevens Coal Company, the Acme Mines, the Coal Valley Mining Company, and the Winifrede Coal Company,—and on the Kanawha & Michigan Railway, or north side of the river, the Boomer Mine, the Long-Acre [101] Mine, the Harwood Mine, the Cannelton Coal Company, the Kelly's Creek Coal Company, the Riverside Coal Company, the Peal Splint-Coal Company, the Marmet-Smith Company, the Plymouth Mines, and the Big Mountain Operating Company. The capacity of the mines of the defendants is about 4,800 tons of coal a day, and of the other mines on the same side of the river about 4,300 to 4,500 tons a day. The defendant coke producers make about 440 tons a day, and the other coke producers of the district about 300 tons a day. Some of the defendants operate mines on both sides of the Kanawha river, but none of the mines on

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the north side are covered by the contract in question. Macdonald, the president of the Fuel Company, prior to the organization of that company and the making of the contract had been engaged in selling coal and coke in Cincinnati and its vicinity from mines along the Chesapeake & Ohio Railway; but the Fuel Company, under the contract, has been selling coal and coke in West Virginia, Kentucky, Ohio, Indiana, Illinois, Michigan, Wisconsin, Missouri, Iowa, Nebraska, North Dakota, South Dakota, Arizona, and Mississippi. The extent and the places of the Western shipment by the defendants, other than the Fuel Company, prior to the making of the contract, are not shown; but the answer alleges that they "had no trade whatever in most of said states, and had very little in the others, except in Cincinnati, Ohio." The other districts and localities competing with the defendants in the Western market are: The New River fields, of West Virginia, with the capacity of about 2,000 tons of coke a day; the Flat Top fields, of West Virginia, on the Norfolk & Western Railway; the fields along the Baltimore & Ohio Railway, the West Virginia & Pittsburgh Railroad, and the Ohio, West Virginia & Pittsburgh Railroad, in West Virginia; the coal fields of Western Pennsylvania; the Hocking, Wellston, and Nelsonville coal fields, of Ohio; and the coal fields of Kentucky, Tennessee, Illinois, Iowa, and Missouri. The aggregate production of all these fields is said to be 115,000,000 tons of coal annually. The defendants' shipment West in 1897 was about 450,000 tons. In 1898 it was about 550,000 tons of coal and from 60,000 to 65,000 tons of coke. The twelfth clause of the contract, in relation to coke and coal shipped by river, was rescinded in June, 1898. Prior to the making of the contract there was a lack of uniformity in the preparation of coal and coke. Under the contract this has been remedied, and the quality of the product has been improved. The minimums of coal and coke which the Fuel Company was required to take and pay for, as provided in the fifth clause of the contract, was in excess of the production of the defendants' mines during the year preceding the making of the contract; the excess of coal being about 60,000 tons, and of coke about 30,000 tons. A man employed by the producers, the defendants

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other than the Fuel Company, and known as the "equalizer," makes the distribution of orders and cars to the shippers. About 3,000,000 tons of coal is shipped East over the Chesapeake & Ohio Railway from the New River and Kanawha districts annually. What portion is shipped from the Kanawha district does not appear. The facilities for placing coal and coke on the Western [102] market have been increased by the operation of the contract, and the monthly payments by the Fuel Company have relieved the operators from losses by bad debts, and have furnished the means for promptly paying the men in their employ. River shipments from the whole Kanawha district are double the shipments of defendants by rail. Prior to making the contract, single operators were sometimes not able to take and fill large contracts. It does not appear that under the contract prices have been materially increased or diminished, but have been maintained.

Two questions have been presented: (1) Does the contract in question relate to interstate commerce? (2) And, if so, will its performance restrain interstate commerce, within the meaning of the act of congress known as the "Anti-Trust Law?"

1. If it be assumed that the Fuel Company was to become the purchaser of the coal produced by the other defendants, and not their agent for its sale to others, with an interest in the profits, yet by the terms of the contract the coal and coke are to be delivered to the Fuel Company for "Western shipment,"—to markets in states other than West Virginia,—there to be sold for not less than a minimum price to be fixed by the executive committee of the association; and the Fuel Company is required to account and pay over to the members of the association all profits made over and above 10 cents per ton, which it is to retain as "compensation" for the use of its capital and for its services. The contract, read in the light of the circumstances under which it was made, shows that it contemplates and provides for the sale of coal and coke in states other than West Virginia; and the evidence shows that, in the performance of the contract, coal and coke have been sold in the states mentioned in the bill. Indeed, the prime object of the contract, as repeatedly ex-

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pressed therein, is "to enlarge the sale of, and extend the Western market for, Kanawha coal and coke." The contract, therefore, and the combination thereunder formed by the defendants, have direct relation to interstate trade and commerce, and in carrying out its purpose interstate commerce has been directly affected.

2. This being so, the question is whether the provisions of the contract which give exclusive control of the output of the mines to the Fuel Company; which prohibit competition between the members of the association; which prohibit the Fuel Company from handling competing coals and cokes; which authorize the executive committee of the association to apportion to its members the class, grade, and quantity of coal and coke to be shipped each month; which fix a minimum price below which the Fuel Company is prohibited from selling coals and cokes in the Western market; and which fix the settlement price between the Fuel Company and the association by a method of monthly averages,—are lawful regulations for the conduct of the business of the defendants, or whether they are regulations in restraint of interstate commerce, as charged in the bill. It is claimed by the defendants "that restriction of competition among only a small proportion of the coal and coke operators or other producers of a particular state, which is ancillary to a main, lawful purpose, and which in fact results in [103] keener and larger competition and greater freedom and volume in interstate trade and commerce, violates no provision of the federal anti-trust act." The "main, lawful purpose" to which the noncompetitive features of the contract are ancillary, as claimed by the defendants, is "to enlarge the sale of, and extend the Western market for, Kanawha coal and coke." But, as is well said in the *Addyston Case*, "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 151, 85 Fed. 282, 46 L. R. A. 131. Here no relationship between

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the parties to the contract exists which calls for the protection of the Fuel Company against the association, by the enforcement of the noncompetitive clauses of the contract. The alleged main purpose of the contract is a provision mainly for the benefit of the association, and incidentally for the benefit of the Fuel Company, by enabling it to earn a commission on sales; and the enforcement of the noncompetitive clauses of the contract would benefit the parties accordingly, but would afford no counterbalancing benefits to the public. It is said, however, that the increase in the volume of trade, the competition in a larger field of operations, the better condition of the product, and the maintenance of reasonable prices, resulting from the performance of the contract, benefit the public, and justify the partial restraint of trade. But the policy of the law looks to competition, as the best and safest method of securing these benefits, and not to combinations which restrain trade. It is opposed to the methods of combination, and will not suffer competition to be destroyed under the pretense that the public will be better served by combination. In the exercise of the power of regulation conferred upon it by the constitution, congress has chosen competition, in preference to combination, as the best factor for the maintenance of the life and the promotion of the ends of interstate commerce, and has prohibited "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations," and has declared that "every persons who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor." Now, it is provided in the contract in question that the Fuel Company shall have exclusive control of "the entire coal and coke output of the mine or mines operated by each of them [members of the association], respectively, on said C. & O. Railway, or branches thereof, for Western shipment, for a period of not less than five years, * * * except as to such coal as may be sold by any member of said coal association to the Chesapeake & Ohio Railway Company for the

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consumption of said railway company;" and it is provided further "that the said members of said association will not sell or consign any coal or coke bound to points [104] west of their respective mines, except under the terms and conditions of this agreement, during the period covered by this agreement," and that the Fuel Company, "nor any of its officers, employés, or servants, will, with its knowledge, directly or indirectly, in any way, manner, or form, engage or become interested in the buying or selling of bituminous coal or coke in competition with the coal or coke of any of the members of said Coal Association, except under the terms and conditions of this agreement." And it is further provided that the minimum price shall be fixed by the executive committee of the association for "all the various grades of coal and coke sold and to be shipped West by the members of said association," and that the Fuel Company "will make no contract for the sale of any coal or coke of any members of said association at a price lower than such minimum price to be fixed by such committee." And it is further provided "that the Fuel Company shall make a monthly report showing the tonnage of the various kinds and grades of coal and coke shipped by members of said Coal Association and weighed during the month, or weighed during such month though shipped during a preceding month, together with an average price for each grade or kind of coal or coke so shipped and weighed, which average price shall be computed upon the basis of the actual price, less gross profits, if any, received for all coal or coke sold, and the minimum price, fixed as hereinafter provided, for such month, for coal or coke not sold in such month; said report to be made not later than the 10th day of each month for all coal and coke weighed, or weighed during the previous calendar month. The coal and coke shipped and weighed or weighed during such month shall be paid for by said Fuel Company to the members of said Coal Association according to the average prices determined as aforesaid." And it is further provided that the executive committee of the Coal Association "shall, not later than the twentieth day of each month, designate the percentage of

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the total product of each class and grade of coal and coke which they deem best to be shipped by each member of said association by rail as aforesaid during the succeeding month." Under these provisions the extent of the production of the mines, the shipment and sale of the product, and the making and regulation of the prices thereof, are subject to the control of the executive committee of the association. All competition among the members of the association in the production, shipment, and sale of their product is eliminated, and the combination enters the Western markets clothed with powers which enable it to exercise a large influence in those markets in regulating the supply and the prices of coal and coke. These provisions are in restraint of trade, and tend to monopoly, within the meaning of the act of congress, and render the contract illegal, in so far as it relates to interstate commerce. The important question is not whether the performance of the contract so far has resulted in actual injury to trade, but whether the contract confers power to regulate and restrain trade, upon those charged with its performance. The attempt to confer power to regulate and restrain interstate commerce by contract is a usurpation of the functions of congress, and [105] cannot be sustained upon the ground that trade has not in fact been injured. It is for congress to determine what regulations of trade will best promote the public good. It is the policy of congress to encourage and promote individual effort. It looks to individual competition, rather than to combinations, for the benefits which are to follow and flow from commerce between the states, and, in the exercise of its constitutional power, has prohibited all combinations which restrain trade. It is for congress to determine whether the policy it has adopted shall be maintained as the one which will best promote the interests of the country, or whether it shall abandon that policy and place the interstate commerce of the country in the hands of combinations. But until congress takes that course, as long as this act remains upon the statute books, it is the duty of the courts to condemn every contract which necessarily in its performance involves a restraint of trade, although it may not extend to the point of a monopoly of all that trade. The

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recent discussion of these questions in the cases of *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S. v. Joint-Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122; *Id.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, render their further discussion here unnecessary. The contract in question here, and the combination of the defendants thereunder, are in restraint of trade and commerce among the several states, and such trade has in fact been restrained in the performance of the contract; and the defendants, and each of them, therefore, will be enjoined from selling or shipping under this contract coal or coke into any state other than the state in which they reside, and the contract, in so far as it affects interstate trade and commerce, is declared to be void and illegal, and the combination of the defendants thereunder will be dissolved.

[845] BISHOP v. AMERICAN PRESERVERS CO. ET AL.^a

(Circuit Court, N. D. Illinois, N. D. October 19, 1900.)

[105 Fed., 845.]

MONOPOLIES—ANTI-TRUST LAW—ACTION FOR DAMAGES.—Section 7 of the anti-trust act (26 Stat. 209), giving to any person injured by any other person or corporation by reason of anything forbidden in the act the right to recover treble damages, does not authorize an action against an alleged trust corporation, by one who was a party to its organization and a stockholder therein, to recover damages resulting from the enforcement by defendant of rights given it by the alleged unlawful agreement.^b

On Demurrer to Amended Declaration.

Lynden Evans and *Frederick Arnd*, for plaintiff.

Moran, Mayer & Meyer, for defendants.

^a See also vol. 1, page 49 (51 Fed., 272).

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KOHLSAAT, District Judge.

This matter comes on to be heard upon demurrer to the declaration herein as amended. A demurrer was sustained to the original declaration in 1892 by Judge Blodgett (51 Fed. 272), and the suit seems to have remained dormant since that year. The suit is for the purpose of recovering treble damages under section 7 of the Sherman act, the facts set forth in the declaration on which plaintiff seeks such recovery being substantially as follows: That plaintiff was prior to the year 1888 engaged in the business of manufacturing preserves, etc.; that in said year he entered into an agreement with certain of the defendants and others to form a trust or combination, which combination was subsequently formed, and to which he conveyed his said business; that defendant American Preservers Company was subsequently organized under the laws of the state of West Virginia for the purpose of acquiring title to the property controlled by said trust, and for the purpose of forming a channel through which said trust could purchase and control the business of plaintiff, and purchase and control the entire manufacture of preserves, etc., in the United States; that plaintiff was forced to execute a bill of sale of his said manufacturing plant and business to said American Preservers Company, but continued to conduct said business under the name and style of A. D. Bishop & Co.; that subsequently differences arose between him and the managers of said trust, and thereupon the said American Preservers Company brought a suit in replevin against plaintiff, and by means thereof obtained possession of plaintiff's entire plant, stock in trade, and business, and still retains the same. In the amended declaration it is averred that the products so controlled by said trust are products used in trade and commerce among the several states of the United States and with foreign nations, and that such products constitute articles of interstate commerce. It would seem that this case would come within the rules of law established by the Supreme Court in *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, although it might be a debatable question as to whether or not the question could be determined on demurrer. However, I am of the opinion that the demurrer should [846] be

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sustained on the ground that the damage which plaintiff claims to have suffered is not of the nature contemplated in section 7 of the Sherman act, when considered in connection with the remaining sections thereof. Whatever damages plaintiff may have sustained in the premises are the result, not of the alleged unlawful combination, but of the exercise of the right, which every citizen possesses, to bring a lawsuit. There is another ground which might well be considered as placing plaintiff without the provision of said act, to wit, the fact that plaintiff was himself a party to the unlawful combination, and was injured by reason of his illegal connection therewith. The demurrer is sustained on the ground that the declaration as amended states no cause of action.

[38] LOWRY ET AL. *v.* TILE, MANTEL & GRATE
ASS'N OF CALIFORNIA ET AL.^a

(Circuit Court, N. D. California. December 26, 1900.)

[106 Fed., 38.]

MONOPOLIES—ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF INTER-STATE COMMERCE.—The Tile, Mantel & Grate Association of California was organized for the purpose, as declared in its constitution and the preamble thereto, of uniting "all acceptable dealers" in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of 200 miles), and all American manufacturers of tiles and fireplace fixtures. Its constitution and by-[39] laws provided that its active members should consist of dealers in such articles in San Francisco and vicinity, carrying a stock of a stated value, who should be elected to membership, each of whom should pay an entrance fee and annual dues, and the nonresident members should embrace all manufacturers throughout the United States who signed the constitution and paid the entrance fee. They provided that no dealer and active member should purchase from any manufacturer or his agent who was not a member of the association, nor sell any unset tiles to any person not a member for less than the list price, and that no manufacturer who was a mem-

^a Demurrer of defendants overruled (98 Fed., 817). See vol. 1, p. 995. Charge to the jury (106 Fed., 38). Judgment affirmed by Circuit Court of Appeals, Ninth Circuit. Case there and subsequently entitled *Montague & Co. v. Lowry* (115 Fed., 27). See p. 112. Affirmed by the Supreme Court (193 U. S., 38). See p. 327.

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ber should sell his products to any dealer who was not a member. *Held*, that such association was illegal and in violation of sections 1 and 2 of the anti-trust act of July 2, 1890, being a combination in restraint of trade and commerce among the states, by imposing a tax on such commerce between its members, to the extent of the membership fees and dues, and an attempt to monopolize a part of the trade in the articles named between the manufacturers in other states and the dealers in San Francisco, which, in operation, did effect such monopoly, and that under section 7 of such act such association and its members were liable in treble damages to a dealer, not a member of the combination, whose business was injured thereby.^a

Action at Law to Recover Treble Damages under the Anti-Trust Act.

Campbell & Metson, for plaintiffs.

Walter H. Linforth and P. F. Dunne, for defendants.

MORROW, Circuit Judge (charging jury).

This is an action at law brought to recover damages alleged to have been sustained by the plaintiffs by reason of injury to their business as dealers in tiles and fireplace fixtures, caused by the forming of an association by the defendants as dealers in such articles, and which association, the plaintiffs claim, is within the prohibitory provisions of the act of congress of July 2, 1890, commonly known as the "Sherman Anti-Trust Act." That act provides, among other things, as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. * * *

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or foreign nations, shall be deemed guilty of a misdemeanor. * * *

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

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You will observe that the things forbidden and declared to be unlawful by the act are: First, every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states; and, second, the act of monopolizing, or attempting to monopolize, or combining or conspiring to monopolize, any part of the trade or commerce among the several states. The charge against the defendants, under these prohibitions, is the organization of an association called the Tile, Mantel & Grate Association of California, under an agreement and combination in restraint of trade and commerce. The printed document [40] introduced in evidence, and entitled, "The Constitution and By-Laws of the Tile, Mantel & Grate Association of California," shows that this association was organized on July 7, 1898, and that the constitution and by-laws were adopted on July 14, 1898. Under the title of "Preamble and Resolutions" the objects of the association are declared to be "to unite all acceptable dealers in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of two hundred miles), and all American manufacturers of tiles, and, by frequent interchange of ideas, advance the interests and promote the mutual welfare of its members." Article 1 of the constitution provides as follows concerning membership in the association:

"Section 1. Any individual, corporation, or firm engaged or contemplating engaging in the tile, mantel, and grate business in San Francisco, or within a radius of two hundred miles thereof (not manufacturers), having an established business, and carrying not less than \$3,000 worth of stock, and having been proposed by a member in good standing, and elected, shall, after having signed the constitution and by-laws governing said association, and upon the payment of an entrance fee as hereinafter provided, enjoy all the privileges of membership.

"Sec. 2. All associated and individual manufacturers of tiles and fireplace fixtures through the United States may become nonresident members of this association upon the payment of an entrance fee as hereinafter provided, and after having signed the constitution and by-laws governing said association."

Article 2 provides as follows concerning fees and dues:

"Section 1. The initiation fee of this association shall be, for active members twenty-five dollars, and for non-resident members ten dollars, which amounts must accompany each application for membership.

"Sec. 2. Each active member of the association shall pay ten dollars per year as dues, payable in advance on the third Monday in August of each year. No dues shall be charged against nonresident members."

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Article 6 makes provision for amendments to the constitution, as follows:

"All proposed alterations or amendments to this constitution shall be submitted in writing at a regular meeting, and no action thereon shall be taken until the next succeeding regular meeting. Due notice of such alterations or amendments shall be mailed to each member at least one week prior to the meeting at which action is to be taken thereon, and such alterations or amendments must receive the approval of two-thirds of the active members of the association."

The document introduced in evidence as the constitution and by-laws of the association contains the provisions which have been quoted, and there is no evidence in the document itself of any amendment thereof. But there is testimony to the effect that that part of article 1 of the constitution limiting the qualification of membership to those persons engaged in the tile, mantel, and grate business in San Francisco, having an established business, and carrying not less than \$3,000 worth of stock, has not been enforced, as to the requirement that the member shall have a stock of goods of the value of \$3,000. There is also testimony to the effect that the provision of article 2 relating to the fees and dues, and fixing the initiation fee for active members at \$25, has been changed to provide that the initiation fee for such membership shall be \$10.

The real purpose and object of the association appears to be declared in sections 7 and 8 of the by-laws. Section 7 provides that:

[41] "No dealer and active member of this association shall purchase directly or indirectly any tile or fireplace fixtures from any manufacturer, or resident or travelling agent of any manufacturer, not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association."

Section 8 provides as follows:

"Manufacturers of tile or fireplace fixtures, or resident or travelling agents of manufacturers, selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel & Grate Association of California, shall forfeit their membership in the association."

The uncontroverted evidence in this case shows that the active members of the association consist of a number of dealers in tiles, mantels, and grates in San Francisco, and that they are not manufacturers of any of these articles; that

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the nonresident members of the association consist of a number of manufacturers of tiles and fireplace fixtures situated in different parts of the United States outside of California. The plaintiffs were not members of the association, and have not been at any time during its existence. Is it the apparent purpose and the natural and direct consequence of this provision of the constitution and by-laws of the Tile, Mantel & Grate Association to restrain trade and commerce between the dealers in tiles, mantels, and grates in San Francisco and the manufacturers of such articles in the Eastern States? Or do these provisions operate in such a way that the members of the association have monopolized or have attempted to monopolize any part of the trade or commerce in these commodities between the manufacturers in the East and the dealers in San Francisco? The purpose of the organization, as declared in the preamble and in section 2 of article 1 of the constitution, was to embrace "all American manufacturers" of tiles and fireplace fixtures, as nonresident members, and the "acceptable dealers" in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of 200 miles) as the active resident members. It does not appear that the declared purpose of the association has actually been accomplished, in the completeness of its membership. Not all American manufacturers of tiles and fireplace fixtures have become nonresident members. Whether all "acceptable dealers" in San Francisco have become members is not entirely clear, nor is it certain what constitutes an "acceptable member." But the natural effect and necessary consequence of the agreement and combination, so far as completed and actually enforced, is to limit the San Francisco dealer who is a member of the association in his purchase of tiles and fireplace fixtures to those manufacturers in the United States who are nonresident members of the association. The San Francisco dealer who has become a member of this association cannot purchase tiles and fireplace fixtures from any outside manufacturer except under penalty of forfeiting his membership in the association, and the manufacturer belonging to the association as a nonresident member cannot sell to any dealer in San Francisco who is not a member of the association, except under the same

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penalty of forfeiture of membership. If all the manufacturers of tiles and fireplace fixtures in the United States should [42] become members of the association, then no dealer in tiles or fireplace fixtures not a member of the association could carry on his business in San Francisco, because there would be no manufacturer of those articles from whom he could purchase the goods; and as he could not purchase from another dealer in San Francisco who, as a member of the association, is entitled to buy from the Eastern manufacturer, except at list prices for unset tiles, he could not compete with other dealers, these list prices being so high. He would thus be practically debarred from continuing his business. On the other hand, if all the dealers in San Francisco should prove to be "acceptable members" of the association, and not all the manufacturers of tiles and fireplace fixtures in the United States should become nonresident members, such manufacturers remaining out of the organization would be deprived of all customers in San Francisco, because no dealer in San Francisco could purchase tiles from such a manufacturer except under penalty of forfeiture of his membership in the association. In other words, the Eastern manufacturer who becomes a member of this association is restricted in his selling market to members of the association in San Francisco, and the San Francisco dealer who is a member of the association is restricted in his purchasing market to manufacturers who are members of the association. But this is not all. The Eastern manufacturer who is not a member of the association is also restricted in his selling market to the dealers in San Francisco who are not members of the association, and the dealers in San Francisco who are not members of the association are also restricted in their purchasing market to those manufacturers who are not members of the association. It will be said, however, that all manufacturers of tiles and fireplace fixtures in the United States may become members of the association. But upon what terms? The manufacturer must apply for and obtain membership in the association, and pay a fee of \$10, and, in order that the San Francisco dealer may have the privilege of purchasing tiles and fireplace fixtures from the manufacturers who are members of the association, he must

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first prove himself to be an "acceptable member" to the other members of the association; and, if he finds himself to be an "acceptable member," he must pay a fee of \$10, and thereafter must continue to pay annual dues in the sum of \$10.

It has been held that an ordinance of a municipal corporation requiring persons or firms soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax is an exercise of the taxing power, and, when enforced against a person or firm soliciting orders for a manufacturer of goods in another state, it imposes a tax upon and is a regulation of interstate commerce, in violation of the provisions of the constitution of the United States.

In *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, a statute of Tennessee declared that all drummers and all persons not having a regularly licensed house of business in the taxing district, offering for sale or selling goods therein by sample, should be required to pay to the county trustee the sum of \$10 per week, or \$25 per month, for such privilege. Robbins was engaged in soliciting in the city of Memphis, Tenn., the sale of goods for a Cincinnati [43] firm, exhibiting samples for the purpose of securing orders for the goods. He had no license, and was prosecuted and convicted for a violation of the statute. The statute made no discrimination between those who represented business houses out of the state and those who represented like houses within the state. There was, therefore, no element of discrimination in the case. But, notwithstanding this equality of the tax upon all dealers, the conviction was set aside by the supreme court of the United States on the ground that, whatever the state might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the state, it could not impose upon those who acted as drummers for houses outside of the state any burden by way of a license tax, for the reason that such persons were engaged in interstate commerce, which must be left free from any restrictions or impositions whatever. Negotiations in the conduct of interstate commerce could not be taxed by the state, or by a municipal corporation under its authority.

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In *Corson v. Maryland*, 120 U. S. 502, 7 Sup. Ct. 655, 30 L. Ed. 699, the same question arose with respect to a provision of the Code of Maryland, and the same doctrine declared as in the preceding case.

In *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368, a statute of the state of Texas required any commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, to pay an annual occupation tax of \$35. This statute was declared to be unconstitutional, and the case of *Robbins v. Taring Dist.* was expressly affirmed, to meet the vigorous assault made by the court of appeals of Texas upon the doctrine of that case.

In *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637, an agent of a firm doing business in the city of Baltimore solicited orders in the District of Columbia without having taken out a license there as required by an act of the legislative assembly of that District. The supreme court held that this law was invalid, as construed to include the business of an agent soliciting orders for a business house located outside the District.

In *Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719, an order of the city of Titusville provided "that all persons canvassing or soliciting within said city orders for goods, books, paintings, wares or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the said treasurer therefor the following sums, according to the time for which said license shall be granted," etc. The facts of the case were these: One Shephard was a manufacturer of picture frames and maker of portraits, residing in Chicago, in the state of Illinois, in which city he had his manufactory and place of business. The defendant, Brennan, was an agent of Shephard, employed by him to travel and solicit orders for said pictures and frames. Upon receiving orders for such goods, Brennan forwarded the same to Shephard, at Chicago, where the goods were made, and from there shipped to the purchasers, in Titusville, in the [44] state of Pennsylvania, by railroad, freight and ex-

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press; and the price of the goods was collected and forwarded to Shephard, sometimes by the express company, and at other times by the agent of Shephard. Brennan was engaged in conducting the business in the manner stated at the time of his arrest, without having obtained a license as required by the municipal ordinance. He was convicted, and sentenced to pay a fine of \$25 and costs. From that judgment he appealed to the supreme court of the state, where the judgment was affirmed; the court holding that the ordinance was enacted in the exercise of the police power of the state. *City of Titusville v. Brennan*, 143 Pa. St. 642, 22 Atl. 893, 14 L. R. A. 100. Brennan thereupon sued out a writ of error to the supreme court of the United States. The whole question was again reviewed by that court, and all the previous cases in that court relating to the subject carefully considered. The court declared that commerce between the citizens of the several states must be absolutely free from restraint. The court said:

"It must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of congress, and that the silence of congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

In *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, the supreme court held that a state statute prohibiting the sale of intoxicating liquors, except for certain purposes and under license from a county court, was unconstitutional and void when applied to a sale by an importer of liquors brought from another state in the original packages, because the operation of the law was repugnant to the power of congress to regulate commerce among the several states. The court, in passing upon the question, said:

"The power vested in congress 'to regulate commerce with foreign nations and among the several states and with the Indian tribes' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. It is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered."

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And further, to make this limitation on state authority over interstate commerce more clear, the court said:

"It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

In the case of *United States v. Coal Dealers' Ass'n* (C. C.) 85 Fed. 252, this court, referring to the case just quoted from, said:

"If a law of a state regulating the sale of intoxicating liquors, so as to prohibit their sale except for certain purposes and under license from a county court, is unconstitutional and void when applied to a sale by an importer of liquors brought from another state in the original packages, because the law in that relation is in restraint of trade and commerce 'among the several states,' what shall be said of the constitution and by-laws of the Coal Dealers' Assn- [45] ciation, and the agreement of that association with the wholesale dealers respecting the sale of imported coal in San Francisco under the anti-trust act? If one is in restraint of commerce, is not the other?"

In *United States v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 54 U. S. App. 723, 767, 46 L. R. A. 122, Judge Taft considered the effect of such state statutes in the same relation, and said:

"If, then, the soliciting of orders for, and the sale of, goods in one state, to be delivered from another state, is interstate commerce in its strictest and highest sense, such that the states are excluded by the federal constitution from a right to regulate or tax the same,—it seems clear that contracts in restraint of such solicitations, negotiations, and sales are contracts in restraint of interstate commerce."

These observations appear to the court to be applicable to the effect of the constitution and by-laws of the Tile, Mantel & Grate Association of California involved in this case. If an ordinance of San Francisco imposing a tax of \$10 upon a solicitor who should seek orders for tiles and fireplace fixtures for an Eastern manufacturer would be contrary to law, because a restriction upon interstate commerce, then a like fee and the conditions of membership imposed by this organization upon Eastern manufacturers for the privilege of selling to San Francisco dealers who are members of the association is also a restriction upon interstate commerce, and would for the same reason be contrary to law.

This brings us to the question as to the effect this organization had upon the price of tiles in this market. Mr. W. B.

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Webster, the secretary and treasurer of the Tile, Mantel & Grate Association of California, testified as follows, on cross-examination:

" Q. After the formation of the corporation, and the adoption of the list price of the American Tile Company by your association, that did raise the price of tile in this market, did it not? You can answer that easy. A. Yes, sir; it raised the price. The Eastern factories raised the price also on us. Q. The Eastern factories raised the price on you? A. Yes, sir; the price was raised twice since that time on us; that is, not the list, but the discount for orders. They are less to-day than they were at that time. Q. That is, the factories from whom you buy? A. Yes, sir; and other factories that notified us of the raise. Q. Did you not state to your counsel that the price had been practically the same for the same character of goods by all the factories? A. From the time of the society up to the present time. Q. Before the formation of the society up to the present time? A. No, sir. Q. You did not so state? A. I did not understand the question, if I did, because it is a known fact that the prices have been raised three or four times. Q. The prices, then, since this formation, have been raised? A. Yes, sir."

As was said by the supreme court of the United States in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 246, 20 Sup. Ct. 96, 44 L. Ed. 149:

"Any combination among dealers in that kind of commodities, which in its direct and immediate effect forecloses all competition, and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another state, would be one in restraint of trade or commerce among the states."

Under these conditions, the dealing in tiles and fireplace fixtures between the manufacturing members of the association in the East and the dealers in San Francisco, also members of the association, [46] is in effect a monopoly of at least a part of the trade and commerce between California and the Eastern states in those articles; and this monopoly, excluding as it does the outside manufacturer and the outside dealer, except upon conditions, is also in restraint of trade and commerce between the several states. The uncontroverted testimony fully supports this practical operation of the agreement and combination, as disclosed by the constitution and by-laws of the association, in whatever light it may be considered. It follows, therefore, that the court is called upon to instruct you that, under the law, the members of this organization have, in violation of law, entered into a contract and combination in restraint of trade and commerce, and that they have attempted to monopolize and have monopolized a part of the trade and commerce between the manufacturers

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in the East and the dealers in San Francisco in the article of tiles.

Under these instructions, there is left for your consideration the single question of damages; and, under the provisions of the statute, if you find that the plaintiffs have been injured in their business by reason of this unlawful combination and association of the defendants, you will find for the plaintiffs in such a sum as shall be equivalent to and represent the actual damages sustained by the plaintiffs. It is for the court, in executing the provisions of the statute in entering judgment upon the verdict (if you shall find for the plaintiffs), to treble the amount of the damages; that is to say, any verdict rendered by you, and upon which a judgment will be entered by the court, will be multiplied by three, and a judgment entered for such treble damages. Your verdict will, however, be limited to the actual damages which the evidence shows the plaintiffs have sustained by reason of the acts of the defendants in violation of the act of congress. The sole question, then, as to damages, in this case, relates to any injury which the plaintiffs may have sustained in their business by reason of the association in question. It is not enough, in an action of this kind, which is one at law, for the plaintiffs to establish the existence of an association which comes within the inhibition of the act of congress. Plaintiffs must go still further, and the burden of proof is upon them to show some real and actual damage to their business by reason of such an association. There is no duty imposed by the law upon the association, even if within the statute, to show that its acts have not worked injury to the business of plaintiffs. On the contrary, the duty and burden of proving damage to their business is imposed by law upon the plaintiffs, and, unless they prove this damage to their business by a preponderance of evidence, the verdict must be for the defendants. Mere speculation as to the possible profits of a mercantile business, in the absence of evidence directed to such conditions, cannot be indulged in by the jury for purposes of finding a verdict in damages. The damages which the law contemplates, and which the act of congress provides for, must be reasonable damages ascertainable upon the evidence presented in the case. There must

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be facts, transactions, actual evidence of some material and pertinent character, relating to a business from which the jury can ascertain with reasonable certainty that damage has actually been worked to such business, before any [47] verdict in damages can be returned, other than nominal damages. It is the duty of a party, under the law applicable in this case, to use all reasonable efforts to make any damage to his business as small as possible. The plaintiffs in an action of this kind are not permitted to claim damage to their business by reason of an association contrary to the statute, where it was within their own power, in the exercise of reasonable diligence, to avert any such damage, and to avoid any consequences of injury to their business; that is to say, a party claiming damages is bound, in the exercise of reasonable diligence, to safeguard himself against any avoidable consequence of the act of another as to which he claims a right to recover damages. It is not material in this case, so far as damages are concerned, that the Columbia Encaustic Tile Company, or some other nonresident member of the association, refused at any point of time to sell tiling to the plaintiffs, if, as a matter of fact, the plaintiffs, by applying to other manufacturers of tile in the same market, whether members of the association or not, could have procured such tiles as may have been necessary in the transaction of their business at the same price. And, if there was a difference in price, the amount of the damages would be limited to such difference in price. If, therefore, you find from the evidence that at any point of time when tiles were refused the plaintiffs by the Columbia Encaustic Tile Company, or any other member of the association, there were in the market other manufacturers from whom at the same price and charges the plaintiffs could have procured such tiles as they needed, you must consider that it was their duty to apply to such manufacturers for tiles; and if they failed to use reasonable diligence in making such application, and thereby failed to provide themselves with the necessary tiles, they are not entitled to any damages by reason of the refusal of such tiles on the part of any member of the association. If the evidence in the case in the matter of damage to the business of the plain-

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tiffs has not shown any real and substantial damage to their business by reason of the association, apart from conjecture or mere speculation, then they are not entitled to any substantial compensation, and no verdict in damages should be rendered in their favor, except a verdict for nominal damages; that is to say, a verdict in the sum of one dollar, or other trifling amount. If you believe from the evidence in this case that in the month of August, 1898, the plaintiffs ordered from the Columbia Encaustic Tile Company of Anderson, Ind., a certain lot of tiles, and said Columbia Encaustic Tile Company agreed to ship the same to them in accordance with the terms of prior agreements, and if you further believe from the evidence that, by reason of the said Columbia Encaustic Tile Company joining the Tile, Mantel & Grate Association of California, they failed and refused to ship said tiles to the plaintiffs, and broke their contract with them, you are instructed that the plaintiffs are entitled to recover, by reason of said breach of contract, the difference between what the tiles would cost them laid down in this market and the market value of the tiles in this market. And, if you find as above, you should find for the plaintiffs in whatever amount you find to be the difference between the cost of said [48] tiles here in San Francisco and the market value of the tiles in San Francisco.

The jury returned a verdict in favor of the plaintiffs, fixing their damages in the sum of \$500.

[131] OTIS ELEVATOR CO. v. GEIGER ET. AL.

(Circuit Court, D. Kentucky. March 30, 1901.)

[107 Fed., 131.]

PATENTS—INFRINGEMENT—DEFENSE—ANTI-TRUST LAW.—In action for the infringement of elevator patents, a private defendant was not entitled to urge as a defense that plaintiff was a corporation organized merely for the purpose of holding the legal title to various elevator patents alleged to have been infringed, for the purpose of controlling sales and enhancing prices of elevators and apparatus, without itself engaging in the manufacture and sale of such appliances, in violation of the Sherman anti-trust law (26 Stat. 209),

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since, until the United States has acted and sought to prosecute the plaintiff for violation of such act, an infringer of the plaintiff's patent will not be permitted to raise such issue as a defense thereto.^a

SAME—PLEADING—INDEFINITENESS.—In an action by a corporation for the infringement of elevator patents, an answer alleging as a defense that the plaintiff is an unlawful combination in restraint of trade and in violation of the Sherman anti-trust law (26 Stat. 209), but which fails to state who are in the combination in the agreement characterized as unlawful, and does not disclose fully and in detail that the combination was entered into after the act took effect, and all the facts necessary to show its illegality, is sufficient for indefiniteness.

Bill for infringement of patents. On exceptions to answer. Exceptions sustained.

Brown & Darby, for complainant.

A. E. Willson and *E. H. Hunter*, for defendants.

EVANS, District Judge.

The complainant, a corporation organized under the laws of New Jersey, in its bill charges that it is the owner, by mesne conveyances duly recorded, of certain letters patent, [132] which the defendants have infringed and will continue to infringe; and the usual prayer for an injunction and accounting of profits is contained in the bill. The defendant has filed an answer, the third paragraph of which is in this language:

"These defendants have no knowledge of the assignments alleged to have been made of the said letters patent, and therefore deny the same, and deny that any right or interest in the said letters patent has been acquired or is now possessed by the complainant; but, upon information and belief, these defendants aver that the complainant, the Otis Elevator Company, is a corporation or association created by the owners of several distinct patents relating to the construction and operation of elevators, for the sole purpose of restraining manufacture, controlling sales, and enhancing prices of elevators and apparatus used in connection therewith,—the Otis Elevator Company not itself engaging in the manufacture and sale of such appliances, but being merely provided to hold the legal title to the said distinct and various letters patent while the original owners thereof are licensed thereunder,—and that by reason thereof no title enforceable in a court of equity has been or is now vested in the complainant."

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The complainant has filed exceptions to this paragraph, and the interesting question thereby raised is to be determined.

Possibly the act of congress approved July 2, 1890 (26 Stat. 209), and commonly known as the "Sherman Anti-Trust Law," is the only statute upon which the courts of the United States, ordinarily speaking, could adjudge such an agreement as the third paragraph of the answer describes to be void. Certainly I do not recall any other which would authorize the courts of the United States to declare a state corporation to be unlawful *ab initio*, as a prohibited combination. We may probably assume that prior to July 2, 1890, there was no law of the United States which provided that such combinations should be invalid. But the act of that date, by its terms, is made to operate only through the penalties which are therein prescribed, or through the direct proceedings which it authorizes the United States to institute to declare certain prohibited arrangements void, or by giving any person who is injured in his business the right to recover multiplied damages, though, in addition, while these statutory remedies, being the ways expressly prescribed for enforcing the act, are otherwise exclusive, it may be quite true that the policy of the United States, as manifested by this legislation, would authorize the courts of the United States, upon more general principles, to refuse to enforce, as between the parties thereto, such combinations as are denounced by this legislation. But, as matter of pleading, it seems to the court that until the United States has acted it does not lie in the mouth of a mere infringer to urge any of these objections as matter of defense to a suit for infringement, and thus divert attention from his own wrongful acts by raising an independent and altogether collateral issue as to the manner in which the complainant acquired title to the patent alleged to have been infringed. If the paragraph showed that the United States, by a direct proceeding in its courts, had already caused the alleged agreement to be adjudged void, though the complainant possibly in that event could not recover for the infringement complained of, the real owner of the patent, whose assignment to the com-

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plainant might thus be shown to have been void, could do so. A judgment in this case in favor of this complainant [133] before such proceedings as have been referred to had taken place would, through the recorded deed of assignment, protect the defendant against another suit by the assignor for the same cause of action, and it therefore seems to the court that the only legitimate issues pertinent to the charge of infringement are very different from the one sought to be raised in paragraph 3 of the answer. It might, indeed, be quite possible for the general objects of the alleged combination to be unlawful, and such as could be enjoined at the suit of the United States, without necessarily affecting other special acts, such as a conveyance to the complainant of the patent. And, as there is no doubt that the conveyance of this patent was in fact made and recorded, it seems to the court that the defendant, under those circumstances, and in an action of this character, cannot be allowed to question the title of the complainant to the patent upon this ground, and the weight of the authorities supports this view. The apparent conflict in the decisions may be somewhat reconciled by ascertaining whether the suits in which they were rendered grew out of contracts or out of torts, as in the former case they may approach nearer the line where the act of congress might operate upon them than in the latter. Chief upon one side of the question are the decisions in the cases of *Strait v. Harrow Co.* (C. C.) 51 Fed. 819; *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 3 C. C. A. 605, 53 Fed. 598; *Soda-Fountain Co. v. Green* (C. C.) 69 Fed. 334; *Saddle Co. v. Troxel* (C. C.) 98 Fed. 620. And upon the other side are the cases of *Harrow Co. v. Hench*, 27 C. C. A. 349, 83 Fed. 36, 39 L. R. A. 299; *Id.* (C. C.) 76 Fed. 667; *Harrow Co. v. Quick* (C. C.) 67 Fed. 130. The first of the last three cases named, it will be observed, was one in which a portion of the contract was sought to be enforced by certain of the parties to the illegal combination, and the court doubtless thought (though it does not very clearly appear from the opinion precisely what relief had been invoked) that, as their contract was vicious, it would leave the parties as it found them, and decline to enforce the agreement. But it is conceived

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that very different principles would apply to parties who sought to enforce portions of the vicious contract from those which would apply to a case like the one before us.

But, whether these views of the court are correct or not, there are certain rules of pleading which apply to paragraph 3 of the answer which must control the action of the court upon the exceptions, because its allegations are too vague and inexplicit, even if another view should be taken of the main question argued upon the exceptions. The paragraph in no way states who are in the combination with the complainant in the agreement characterized as unlawful. Such a defense, if maintainable, should very explicitly and exactly show how the complainant is an unlawful association, giving all the necessary particulars, in order that the complainant can know precisely what it is to meet, and so that the court can determine whether all the rights of the complainant to protect its claim to a patent have been forfeited, ipso facto, the entering into such an association; and the averments of the answer should be made in such clear terms as to show that the defendants, under the law and upon the facts they state, can thereby defeat an action against them which might otherwise be [134] meritorious. The court should take nothing for granted in such a case, and the pleading should disclose fully and in detail not only that the combination was made after July 2, 1890, but all the facts necessary to show the illegality of the association. And the fact that the complainant is a corporation organized under the laws of a state may make these requirements all the more exacting and emphatic.

The initial statements in the paragraph, being mere denials, are sufficient; but from either point of view the court is of opinion that the exceptions to the third paragraph of the answer should be allowed so far as they apply to those parts of the paragraph beginning with the words, "But, upon information and belief, these defendants aver that the complainant, the Otis Elevator Company, is a corporation or association created by the owners of several distinct patents relating," etc., and continuing to the close of the paragraph. An order can be prepared accordingly.

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[210] GIBBS ET AL. v. McNEELEY ET AL.^a

(Circuit Court, D. Washington, W. D. March 15, 1901.)

[107 Fed., 210.]

ANTI-TRUST LAW—RESTRAINT OF INTERSTATE COMMERCE.—A combination controlling not only the manufacture of an article in the state, but also the sale of the manufactured article, is not one in restraint of interstate commerce, so as to give a right of action against it, under the anti-trust law of July 2, 1890, to one injured by a resolution passed and circulated by it denouncing him for cutting prices, its sales being within the state, and any transportation and sale of the article in other states being by other agencies.^b

T. O. Abbott, for plaintiffs.

C. O. Bates, Chas A. Murray, and J. H. McDaniels, for defendants.

BELLINGER, District Judge.

This case is being tried on what is known as the "fourth cause of action." In this cause of action it is alleged, in effect, as follows: That the defendants, with the intent to injure and destroy the plaintiff's business, and to bring plaintiff into public odium and discredit, and to provoke him to wrath, and to induce his patrons in the various states to withdraw their patronage from him, and to destroy his credit and business, did maliciously compose and declare a certain communication of and concerning plaintiff and his business, as follows: Said committee did adopt, and enter upon the records of the association, and did distribute and publish, certain resolutions, whereby it was falsely and maliciously alleged that plaintiff was endeavoring to injure the market for Washington red cedar shingles, and whereby it was further falsely and maliciously stated that plaintiff had no money invested in said business, and that he was without credit, and irresponsible, and was not an honorable and legitimate dealer in said shingles. That, thereafter the said

^a Demurrer overruled as to fourth cause of action (102 Fed., 594). See p. 25. Verdict for defendants in error directed (107 Fed., 210). Reversed by Circuit Court of Appeals, Ninth Circuit (118 Fed., 120). See p. 194.

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committee, by its officers, etc., with intent to induce all wholesale and retail dealers in the states and foreign countries named to refuse to buy shingles of plaintiff and do business with him, and to induce the manufacturers to refuse to sell shingles to plaintiff, did publish said resolutions by print-[211] ing the same in circular form, and addressed the same to various wholesale and retail dealers throughout the state of Washington and other states, and to a large number of newspapers and trade journals in Washington and other states, etc. That by virtue of said conspiracy and of the advertising so done the defendants did bring the plaintiff into odium and discredit with said manufacturers, so that they refused to sell him Washington red cedar shingles, and did also bring him into odium and discredit with a large number of his patrons and clients, so that they refused to buy shingles of him, and did totally destroy plaintiff's business.

In the case of *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, the supreme court held that, although the American Sugar-Refining Company had obtained a practical monopoly of the business of manufacturing sugar, yet the act of congress did not touch the case, because the combination only related to manufacture, and not to commerce among the states or foreign countries; that a combination which directly related to manufacture only was not brought within the purview of the act, although, as an indirect and incidental result of such combination, commerce among the states might be thereafter somewhat affected. The court in that case says:

"The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce."

In the more recent case of *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 239, 20 Sup. Ct. 96, 44 L. Ed. 136, the principle was recognized that a combination to control manufacture is not a violation of the act of congress, since such a combination does not directly control or affect interstate commerce. The court distinguishes such a combination from

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one having for its object the sale and transportation to other states of specific articles. Combinations of the latter class are held to be proper subjects for regulation, because they enter into such commerce. To which class does the case on trial belong? Plaintiff contends that, inasmuch as the combination under consideration controls not only the manufacture, but the sale, of the manufactured product, this case belongs in the latter class; that defendants' combination affects interstate commerce, and is therefore made unlawful by the act of congress. The reason why the manufacture within a state of an article of commerce is not within the purview of the act, although the manufacturing combination constitutes a monopoly, being that it involves nothing in the way of interstate commerce, does it alter the case that the combination includes the sale of its product among its objects? I am of the opinion that it does not; that the lawfulness of what is done depends upon the place directly affected, and not upon the character in other respects of what is done. It makes no difference that the manufacturer intends his product for sale in other states and foreign countries. Such an intention does not alter the character of the combination to manufacture, and upon this principle it makes no difference that the contract or combination is for the manufacture and sale of [212] specific articles. It must go further, and provide for the sale and transportation to other states of the specific articles; otherwise, what is proposed cannot be said to look to interstate commerce. Mere state commerce is a matter of state control. In this case the action of the defendants in providing for the sale of their product is without reference to interstate commerce. The defendants manufacture and sell within the state, with the intention that the product sold shall all be used within the state, or transported and sold out of it, as the purchaser shall decide. The sale and the manufacture cannot be distinguished, so far as the question of state control is concerned; both take place within the state; both are equally within its police power; both affect interstate commerce in the secondary sense merely; neither affects it in the primary sense. If the shingles manufactured are transported and sold in other states, it is done by other agencies and com-

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binations not responsible to the Washington Red Cedar Shingle Manufacturers' Association, and not provided for by their contract of association. If the plaintiff has suffered injury by reason of the alleged combination, it is within the province of his state to provide him a remedy. This court is without jurisdiction in the premises.

The learned judge of this district, in passing upon the demurrer filed in this case (102 Fed. 594), expresses the opinion that the plaintiff is entitled to recover upon the fourth cause of action set out in the complaint. The proof submitted, however, does not sustain this cause of action. The only charge affecting the plaintiff made out by the evidence is that he is a rate cutter. All else contained in the circular complained of is merely inference, more or less doubtful, drawn from the alleged fact that plaintiff was engaged in cutting rates. It is stated in the circular that the plaintiff was endeavoring to injure the market for Washington red cedar shingles, but it is plainly enough stated that he is endeavoring to do this by cutting rates. It is stated that he has no money invested in the business, and his own testimony is to that effect. But, whether true or false, it does not affect his business integrity or capacity. The circular announces the purpose of those issuing it to deal with responsible, honorable, and legitimate dealers; and, having announced a purpose not to deal with the plaintiff, this statement is construed to mean that the plaintiff is an irresponsible and dishonorable dealer, whose methods are not legitimate. But the only inference admissible as to this is the inference that the authors of the circular intend to have nothing to do with rate cutters, because they regard the practice of rate cutting as an illegitimate and dishonest practice; an opinion based upon a fact stated, and not injurious unless the fact to which it is related is of that character. The plaintiff, with many years' experience in the shingle business, is presumed to know whether the charge of rate cutting involves the integrity of those against whom it is made, and it appears that some years ago he advertised himself to his customers in a circular issued in behalf of a firm to which he belonged as a rate cutter, and sought to attract business by the announcement. I am of the opinion that a verdict based

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upon such testimony ought not to stand, [213] and, if so, a verdict for the defendants should be directed. But with the utmost respect for the opinion of the learned judge just referred to, I am convinced that the allegations in the fourth cause of action are not sufficient. The allegations are of a libel, and the damages alleged do not result from any combination, or conspiracy, or monopoly denounced by the act of July 2, 1890. No such combination or conspiracy or monopoly is shown. And, if the parties to the circular in question can be said to have conspired to libel the plaintiff and injure his business, their conduct was not in restraint of trade, and within the mischief intended to be prevented by the act of congress.

[909] METCALF v. AMERICAN SCHOOL-FURNITURE CO. ET AL.^a

(Circuit Court, W. D. New York. May 13, 1901.)

[108 Fed., 909.]

CORPORATIONS—SUIT BY STOCKHOLDER—MULTIFARIOUSNESS OF BILL—

A minority stockholder in a corporation may maintain a suit in equity in behalf of himself and all other stockholders similarly situated to set aside an alleged unlawful transfer of the property of the corporation in pursuance of a conspiracy between its officers and the transferee in restraint of trade and commerce, where it is alleged that the corporation, on demand, has refused to bring such suit; but a bill for such relief which also seeks the recovery of treble damages under the anti-trust act of July 2, 1890, is multifarious, since such damages are only recoverable in an action at law by the plaintiff as an individual, and not as a stockholder, while the equitable relief prayed for is in behalf of the corporation, and, if granted, would inure to the benefit of all the stockholders.^b

In Equity. On motion for temporary injunction and demurrers to bill.

^a Affirmed by Circuit Court of Appeals, Second Circuit (113 Fed., 1020), and plaintiff allowed thirty days in which to amend. Memorandum decision. See p. 111. Amended bill dismissed (122 Fed., 115. See p. 234.

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Seymour, Seymour & Harmon, for orator.

Davies, Stone & Auerbach (*Joseph Auerbach and Brainard Tolles*, of counsel), for defendants *American School-Furniture Co.* and *Oakman and Turnbull*, trustees.

Maulsby Kimball, for defendants *Buffalo School-Furniture Co.* and others.

HAZEL, District Judge.

The orator, Caroline Metcalf, holder of 569 shares of stock in the Buffalo School-Furniture Company, is a citizen of Connecticut. She brings this bill in equity in behalf of herself and all other stockholders having like interests with her, not citizens of New York, against the Buffalo School-Furniture Company, incorporated in the state of West Virginia, but transacting its business and having its property in the state of New York; Oliver S. Garretson, Henry R. Hoffeld, Frederick C. Garretson, Edward C. Shafer, Robert L. Cox, and Albert D. Garretson, directors of that corporation, owning 80 per cent. of the capital stock, all of whom are residents of the state of New York; the American School-Furniture Company, a corporation of the state of New Jersey; and Walter G. Oakman and George R. Turnbull, residents of the state of New York, who claim to have an interest in the property described in the complaint, as trustees for the holders of bonds of the defendant American School-Furniture Company. She alleges that the directors of the defendant Buffalo School-Furniture Company, without her consent, [910] and the defendant American School-Furniture Company, on the 2d day of March, 1899, entered into an unlawful combination and conspiracy whereby it was agreed that there should be no competition in the United States in the purchase and sale of school furniture and similar articles, and that the defendants contracted, combined, and conspired to restrict, restrain, monopolize, and control trade and commerce among the several states in school furniture; that this was done to increase and control the price in contracts for the delivery of school furniture and the like among the several states and with foreign nations, and within the several states. The bill, at great length, alleges conspiracy, and after stating

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that the nominal capital of the defendant American School-Furniture Company is \$10,000,000, all of which, after the formation of that corporation, was issued for property, or for options for property, held by promoters of the company, not exceeding \$3,000,000 in value; that the defendant American School-Furniture Company borrowed \$1,000,000, which still constitutes a liability, and which loan the promoters were able to obtain on the property acquired; that a large secret profit was made out of the transaction; that the consideration for the transfer of the property of the Buffalo School-Furniture Company to the American School-Furniture Company was the sum of \$137,461 in cash, \$15,000 in notes, 1,300 shares of the common stock, and 1,300 shares of the preferred stock, of the American School-Furniture Company,—it is further alleged that no business whatever has been actually carried on by the defendant Buffalo School-Furniture Company since the transfer; that its board of directors, acting beyond their power, intend to wind up and dissolve the company and distribute all of its assets, including the stock of the American School-Furniture Company, among its stockholders, pro rata, although the American School-Furniture Company and the aforesaid directors know said stock to have no value. It is further alleged that the total capital stock of the Buffalo School-Furniture Company is \$350,000, divided into 3,500 shares, of the par value of \$100 each; that the complainant requested the Buffalo School-Furniture Company to bring an action in equity to undo the transactions herein complained of, and recover its real estate and other assets from the defendant American School-Furniture Company; that she has exhausted all the means within her reach to obtain within the corporation itself the redress of her grievances; that the property and earning capacity of the Buffalo School-Furniture Company will be destroyed; and that she brings this bill for the benefit of herself and all the stockholders of the Buffalo School-Furniture Company who may be similarly situated who are not residents of the state of New York. It is further alleged that this fraudulent combination and scheme were fully consummated by the defendant directors and the American School-Furniture Company, and that complainant has never consented thereto; that she, being without remedy

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by the strict rules of the common law, prays that the American School-Furniture Company and the defendants the directors of the Buffalo School-Furniture Company may be decreed to be personally liable to her in the premises for treble [911] the damages which she has sustained, and that the transfer of the real estate and all of the property and assets of the Buffalo School-Furniture Company may be set aside; that it be restored, reconveyed, and again vested in the Buffalo School-Furniture Company, and that her damages may be ascertained and trebled; that a receiver be appointed; that the treble damages that may be adjudged and awarded to her may be charged as a lien upon said real estate formerly of the Buffalo School-Furniture Company; that the lien may in this proceeding be foreclosed; and that she be paid the damages and treble damages awarded and adjudged to her out of the proceeds of such sale.

The defendants have all demurred to the bill on grounds of multifariousness and want of equity. This suit is properly brought by the plaintiff as a shareholder in the Buffalo corporation, suing, as she alleges, for herself and for and on behalf of all other stockholders not residents of the state of New York. The Buffalo School-Furniture Company is under control of the guilty parties, and they have refused to sue when requested by the complainant so to do. *Hawes v. City of Oakland*, 104 U. S. 450, 26 L. Ed. 827; 2 Cook, Corp. § 701; *De Neufville v. Railroad Co.*, 26 C. C. A. 306, 81 Fed. 10; *Porter v. Sabin*, 149 U. S. 478, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Weir v. Gas Co.* (C. C.) 91 Fed. 940.

The primary question immediately arises whether this individual demand for damages is not inconsistent and antagonistic to the equitable relief sought in the bill, and whether these are not demands for equitable and legal relief upon distinct and independent grounds. Innumerable acts are alleged to have been committed in pursuance of the conspiracy. It is also claimed that the conspiracy formed and carried out by the directors was and is in violation of the act of congress of July 2, 1890. Her grievance for which she demands relief is that of a minority stockholder suing for herself and several other stockholders. The damages alluded to in the bill, which she demands for her sole and in-

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dividual benefit, appear to be the treble damages awarded to a person who is injured in his business or property by the acts of any other person or corporation forbidden or declared to be unlawful by the federal anti-trust law. It is strenuously insisted that the subject-matter of this case, because of the diverse citizenship of the parties, is properly before the court, irrespective of the act of 1890, and that, as the bill states a cause of action in favor of the dissenting stockholder without reference to that statute, a court of equity, having thus obtained jurisdiction of the subject-matter, may administer all the relief which justice demands; that the damages sought are incidental to the demand for equitable relief, and the court has power to completely adjust all the rights of the parties. *Madison Ave. Baptist Church v. Oliver St. Baptist Church*, 73 N. Y. 96. It is a general rule that a court of equity, having acquired jurisdiction of the subject-matter, may mold its decrees according to the circumstances of each case. The damages, however, sought to be recovered in this suit, in the light of the demand set out in the complaint, at paragraphs 24, 26, 28, and 31, cannot be re- [912] garded as supplemental to the revesting of the property or incidental to the relief sought by the bill. The relief sought, other than the individual demand for treble damages, is in equity. Section 7 of the federal act of 1890 is declaratory of a common-law right which existed in favor of parties injured by wrongs enumerated in other sections of that act, and confers jurisdiction to seek a remedy, and with treble damages, in a federal tribunal. The character of the right of action is in no way changed, and still remains one in tort. *Blindell v. Hagen* (C. C.) 54 Fed. 40; *Pidcock v. Harrington* (C. C.) 64 Fed. 821; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 86 Fed. 407; *Block v. Distributing Co.* (C. C.) 95 Fed. 978. It inures in the case at bar to the complainant individually, and not to her as a stockholder, as an additional asset of the corporation. All other relief sought, if granted, must in the end belong and come into the hands of the corporation, to the advantage of the stockholders thereof. *Cook, Corp.* § 701, and cases cited; *Church v. Railroad Co.* (C. C.) 78 Fed. 526; *Whitney v. Fairbanks* (C. C.) 54 Fed. 985. This case is clearly distin-

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guishable from *De Neufville v. Railroad Co.*, 26 C. C. A. 306, 81 Fed. 10, cited by counsel for complainant. In that case the relief was demanded in form in favor of the complainant individually, but in law belonged to the corporation of which the complainant was a stockholder, while in this case the treble damages sought by virtue of the anti-trust act would belong to the individual complainant, and not to the corporation of which she is a stockholder. In the case of *Pidcock v. Harrington*, *supra*, Judge Coxe said, in relation to the anti-trust act:

"It is clear that the right to maintain in such a suit [in equity] is not expressly conferred by the act. Indeed, such right is by implication denied: * * * First, because a private person is given (section 7) the right to maintain an action at law; and, second, the district attorneys of the United States, under the direction of the attorney general (section 4), are charged with the duty of commencing suits in equity. If it were the intention of the lawmakers to vest in every irresponsible individual who may deem himself aggrieved the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose they would have said so in unambiguous terms?"

To the same effect is the decision of Judge Baker in *Southern Indiana Exp. Co. v. United States Exp. Co.* (C. C.) 88 Fed. 659, affirmed by the circuit court of appeals in 35 C. A. 172, 92 Fed. 1022. The learned district judge said:

"The anti-trust law of July 2, 1890, has wrought no such change in the law as will enable the court to enforce its provisions in favor of a private party by a bill in equity. Under this act, the only remedy given to any other party than the government of the United States is an action at law for threefold damages, with costs and attorney's fees; and the only party entitled to maintain a bill in equity for injunctive relief for an alleged violation of its provisions is the United States, by its district attorney, on the authorization of the attorney general."

Without deeming it necessary to specifically set out all of the grounds of demurrer of the various defendants interposed herein, it may be said that the chief grounds argued by counsel were the multifariousness of the bill, and want of equity in favor of the orator gen- [913] erally. The bill, at great length, alleges conspiracy in restraint of trade and commerce, negligence, and ultra vires acts of the directors of the Buffalo School-Furniture Company, resulting in the depreciation of the value of its stock and property. I think that the bill, with its inferences, sufficiently avers a conspiracy in restraint of trade and commerce to enable the

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complainant to give proof of the charge in support of her allegation. If these alleged unlawful acts are proven, injury has been sustained by the corporation, and therefore equity will afford relief. This would entitle the plaintiff, as a stockholder, to equitable relief.

The objection that the bill is demurrable because it lacks equity fails. The defendants Oakman and Turnbull have filed a plea in addition to their demurrer. It is not strictly necessary for the court to pass upon the sufficiency of this plea, having come to the conclusion that the demurrer filed by these same defendants must be sustained. The court is of the opinion, however, that the benefit of the plea should be saved to the hearing, in accordance with the rule laid down in *Story, Eq. Pl. §§ 697, 698*. The motion for a temporary injunction is denied. Demurrers sustained, with costs to the various defendants; complainant having leave to amend within 30 days.

[689] DELAWARE, L. & W. R. CO. v. FRANK ET AL.

(Circuit Court, W. D. New York. August 26, 1901.)

[110 Fed., 689.]

CARRIERS OF PASSENGERS—SPECIAL TICKETS—CONTRACT PROHIBITING TRANSFER.—A common carrier has a right to issue and sell special tickets at a reduced rate of fare in consideration of the purchaser's agreement to certain conditions and limitations contained therein, among which it may be stipulated that the ticket shall not be transferred, and the use of such a ticket by another to whom it has been transferred in violation of the contract is an actionable wrong.^a

SAME—CONTRACT MADE BY TICKET—INTERFERENCE WITH PERFORMANCE BY THIRD PARTIES.—A railroad ticket broker who induces the purchaser of a special ticket, in which he has agreed, for a valuable consideration, not to transfer the same, to violate such agreement by selling the return portion of the ticket for the purpose of having it used by another, is guilty of an actionable interference with the performance of the contract.

FEDERAL COURTS—PARTIES TO SUIT IN EQUITY—DISMISSAL AS TO CERTAIN DEFENDANTS.—A federal court may dismiss a suit as

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against defendants between whom and the complainant the requisite diversity of citizenship does not exist, and retain it as to remaining defendants over whom it has jurisdiction, where the defendants dismissed are not indispensable parties; and their dismissal will not prejudice the rights of the others.

INJUNCTION—PARTIES—JOINDER OF DEFENDANTS.—In a suit by a railroad company for an injunction to restrain the purchase from passengers of partly-used tickets, nontransferable by their terms, and their resale for use in violation of the contract contained therein, where different brokers are engaged in dealing in the same class of tickets, all or any number of them may be joined as defendants.

JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—SUIT FOR INJUNCTION.—In a suit for an injunction the amount involved for the purpose of determining the jurisdiction of a federal court is the value of the right to be protected, or the extent of the injury to be prevented, by the injunction.^a

INJUNCTION—GROUNDS—INADEQUACY OF LEGAL REMEDY.—A court of equity has jurisdiction of a suit to enjoin wrongful acts by defendants where the complainant's legal remedy involves numerous actions against irresponsible defendants, to recover small sums, in which the damages would not be clearly susceptible of proof, and which, if successful, would not result in any practical benefit to complainant.

EQUITY—RIGHT TO INVOKE JURISDICTION—PROTECTION OF CONTRACTS ARISING OUT OF UNLAWFUL COMBINATION.—In a suit by a railroad company to enjoin the defendants, who were ticket brokers, from dealing in special tickets issued by complainant on account of the Pan-American Exposition, which were by their terms nontransferable, it appeared from the showing made on a motion for a preliminary injunction that complainant was a member of a combination known as the "Trunk Line Association," formed by a number of railroads operating in different states for the purpose of preventing competition; that the passenger receipts of all such roads were pooled and divided on an agreed basis; and that the special rates made on account of the Exposition were fixed, and the terms of the tickets which were the basis of the suit prescribed, by such association through its passenger committee. *Held*, that such combination was illegal, as in violation [630] of the federal anti-trust law (26 Stat. 209), and that complainant could not invoke the aid of a federal court of equity for the protection of rights claimed under contracts which were the direct result and evidence of such unlawful combination.

In Equity. On motion for preliminary injunction.

Rogers, Locke & Milburn, for complainant.

^a Jurisdiction as affected by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Shoe Co. v. Roper*, 36 C. C. A. 459.

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Roberts, Becker, Messer & Groat, Laughlin & Ewell, Louis L. Ullman, and George F. Schultz (Tracy C. Becker and Louis Marshal, of counsel), for defendants.

HAZEL, District Judge.

The injunctive relief of this court is invoked by the complainant on the ground of diverse citizenship, and on the further ground that, by the wrongful and fraudulent action and threatened continuance of the wrongful and fraudulent sale of special coach excursion tickets, account Pan-American Exposition, by the defendants, the complainant is damaged far in excess of the sum of \$2,000. The complainant is a citizen of Pennsylvania. The bill alleges that the complainant believes the defendants are citizens of New York. A restraining order was heretofore allowed on the bill and accompanying affidavits, with an order to show cause why an injunction pendente lite should not be granted. Sixty-one defendants are proceeded against, many of them under the name of John Doe. By the bill it is claimed that the complainant railroad corporation is greatly wronged and damaged by the fraudulent and unlawful acts of the defendants, who are railroad ticket brokers engaged in business at Buffalo, N. Y. After reciting that the complainant operates a railroad for the carriage of passengers and freight for hire between Hoboken, N. J., and Buffalo, N. Y., and branch lines connecting with its main line and various other railroad lines with which it interchanges freight and traffic, the bill alleges that there is now being held in the city of Buffalo, within the jurisdiction of this court, the Pan-American Exposition; that, shortly before the opening of the Exposition, application was made by the officers thereof to the complainant and other railway companies connecting with it, to reduce their usual and ordinary rate of fare charged for passenger transportation from points along their lines to Buffalo and return to the initial point. To this request, it is alleged, complainant consented, and thereafter caused to be sold at its various stations tickets for special round trips and excursions to Buffalo at greatly reduced rates. The bill further alleges that, in consideration of such reduced rates, such tickets provide that the same shall not be transferable nor

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be valid or accepted for transportation in the hands of any person other than the original purchaser; that the same shall be good for only a specified number of days from the date of sale stamped thereon, and before being presented for return passage shall be stamped by a validating agent at Buffalo not later than the day canceled thereon,—that being the day on which said ticket shall be used for return to the initial point, and then to be used by continuous passage on the same train. The ticket has printed on its face the words, "Special Excursion Ticket, Account Pan-American Exposition." The conditions as above set [691] forth are printed thereon, and the purchaser is required to subscribe to the following contract:

"In consideration of the reduced fare at which this ticket is sold, I, the purchaser, hereby accept and agree to be governed by all the conditions as stated in the above contract."

It is further alleged that the New York Central & Hudson River Railroad Company and the West Shore Railroad Company, connecting roads, have issued like tickets, which are good in part over complainant's road. The bill then alleges broadly that defendants are engaged as ticket brokers or ticket scalpers at Buffalo, and in the conduct of their business procure from the original purchasers, and other persons in many instances, the return portions of such tickets purchased by them from Buffalo to the initial point, and that, when the same are procured, such tickets are sold to other persons, who, by falsely impersonating the original purchaser before the validating agent of complainant, and signing the original purchaser's name to such ticket, are enabled to use such tickets for transportation over complainant's railroad. It is further alleged that defendants, by billboards and placards placed over and in front of their various offices, give notice that they buy and sell such tickets at cut rates; that they employ solicitors to intercept persons originally purchasing such Pan-American special-rate tickets, on their arrival at Buffalo, for the purpose of purchasing the return portions of such tickets, and that such tickets are disposed of to the traveling public; that the purchaser is instructed how to impersonate the original purchaser so as to escape detection. It is also charged that forgeries and other fraudu-

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lent and wrongful acts are committed by the defendants, the original purchaser of the ticket, and the purchaser from the defendants, for the purpose of hindering and impeding the complainant in its business, and to deprive it of the sale of tickets at the regular and ordinary rate from Buffalo to other points along its line, and to defraud it out of the amount of the fare which the person fraudulently using such ticket would otherwise pay for such transportation. It is also alleged that the defendants are pecuniarily irresponsible, that it is impossible for complainant to establish from which of the defendants fraudulent tickets are purchased, and that no practicable means exist by which the frauds of the defendants can be detected or prevented. The bill also alleges that the defendants, or many of them, are united in an association and band and conspire together to carry on the business of purchasing and disposing of said tickets, and that complainant's business is thereby greatly injured, and its earnings and profits lessened. At the time of the hearing on the motion to continue the injunction, 36 defendants appeared, by counsel, specially, to object to the jurisdiction of the court. Other defendants appeared in person. The ground of objection is that a diversity of citizenship does not exist between complainant and many of the defendants. Affidavits of two defendants were read and filed, showing that they are citizens of the same state as the complainant. Affidavits of other defendants were also read and filed, from which it satisfactorily appears that such defendants are not citizens of New [692] York. The affidavits denying diversity of citizenship are, upon this application, treated as a plea to the jurisdiction of the court to grant the provisional relief sought.

Defendants contend (1) that the bill cannot be dismissed as to any defendant not within the jurisdiction of the court without a dismissal of the bill as to all defendants; (2) that the bill does not state a cause of action, either in law or equity, against any of the defendants; (3) that complainant is engaged in an open violation of the anti-trust law of congress in maintaining in combination with other railroads a rate of fare to the Exposition and return to the initial point; (4) that the bill ought to be dismissed on the further ground that its essential allegations and those of the accompanying

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affidavits are made on information and belief, or by a person who has no actual knowledge of the facts alleged.

This application is based mainly upon the bill of complaint. The bill, however, is positive in many of its allegations, and being verified, may therefore be considered an affidavit as a basis for provisional remedy. *Hecker v. Mayor*, etc., 28 How. Prac. 212, and cases cited. The defendants' counsel contend that the allegations of complainant's papers are not made in such a direct and positive manner that the writ of injunction may issue. An examination of the averments of the bill and the affidavits submitted convinces me, however, that this objection is untenable. I deem it quite uniformly settled by the courts of the United States and by the state courts, where the question has been considered, that a common carrier has a right to issue and sell tickets along and over its line or road at reduced rate of fare in consideration of the purchaser's agreement to on his part conform to conditions and stipulations expressed by the ticket and furnished to the purchaser. The conditions to which the purchaser of complainant's ticket assented were, substantially, that the ticket should not be transferred to another for use; that the purchaser would present the return portion of the ticket for use within a specified time; that he would affix his signature in the presence of the joint agent on the reverse side of the return portion on or before the day limited for return use. It was held in the case of *Railroad Co. v. McConnell* (C. C.) 82 Fed. 65, that the right to make and issue a special form of ticket, furnishing a reduced rate of fare, and thereby aiding in a great public purpose, is fully recognized both at common law and by legislation, and that the use of one of these tickets in violation of the contract by a person other than the original purchaser is a fraud upon the common carrier. It follows that the right to impose conditions upon its passengers in consideration of the acceptance of a ticket at reduced fare carries with it a right to limit the ticket as to time, the train on which it is to be used, and to prohibit a sale and transfer thereof to another person. Defendants admit a right of limitation as to time, restrictions as to train to be used, and that a railroad company may require the ticket issued by it to be stamped.

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They insist, however, that, as the ticket is property, a prohibition of its sale is equivalent to depriving its owner of acquired property; that he obtains by the purchase thereof an assignable right, and also the right to authorize another to indorse his name [693] on the ticket whenever it is required by the contract of purchase. I cannot accept this view. No substantial reason presents itself why a purchaser of transportation from a common carrier in consideration of the reduction of fare from the ordinary rate should not abide faithfully by reasonable restrictions and limitations contained in the contract of purchase. While a person may obtain an assignable right in a railroad ticket, yet, when the right obtained is curtailed or limited, the purchasing party, assenting to the limitation for a valuable consideration, must hold his obligation as inviolate as he has a right to hold that of the railroad company. In consideration of the price paid for the ticket the purchaser obtains the right of passage, and as well obligates the common carrier to other responsibilities. Where a right of passage is obtained by special contract and at a reduced rate of fare, carrying with it restrictions and limitations, the purchaser receives a consideration which makes it obligatory on him to in good faith carry out his agreement. A violation of the contract of transportation by the common carrier lays it open to legal liabilities and consequent remedies. The contract is binding on both. If the time in which a return part of the ticket may be used has lapsed, the purchaser of the ticket has failed to accept a right guaranteed him by the contract. Failure to use the return portion of the ticket by him must be deemed his own voluntary act or neglect. The common carrier is required to transport the purchaser on his return without additional compensation. It may be required to provide for his use such comfort and conveniences as are usually allotted to the traveling public. This question was only recently before the Fourth department, appellate division of the supreme court of New York. *People v. Caldwell*, 71 N. Y. Supp. 654. Justice McLennan, speaking for the court, said: .

"We think the decision in the case of *People ex rel. Tyroler v. Warden*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763, must be regarded as decisive of the proposition that it is not competent for the legislature to prohibit the purchase and sale of

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passage tickets over transportation lines when such sale is not in violation of any contract made with the transportation companies upon the sale of such tickets by them."

This was a case brought before the court on appeal from a final order in habeas corpus proceedings discharging the relator from arrest. The relator was arrested for violating an act of the legislature passed in 1901, which by its terms provided, in substance, that no person shall sell a passage ticket giving any right to a passage or conveyance upon any railroad train, unless it be an authorized agent of the company running such train, or unless he has received a certificate of authority therefor, in writing, from such company. The court followed a decision of the court of appeals (*Tyroler v. Warden, supra*) holding such a penal statute unconstitutional. It will be seen that the appellate division limited its decision, and interpreted the decision of the court of appeals, to tickets issued over railroad lines whenever such sale is not in violation of contractual obligations. It is clear that a limitation upon the use of a ticket as to time and its use by another than the original purchaser may be restricted and limited to the fair and true intendment of the contract. When, therefore, a subsequent purchaser of a ticket from a broker, who pur- [694] chased the ticket from the original purchaser, uses the same, he becomes liable to the railroad company wronged, in an action at law, for any damage sustained. No obligation exists on the railroad company to transport a passenger holding such a ticket. *Mosher v. Railway Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249. It is equally clear that the interference of the ticket broker in inducing a person holding the return part of a ticket purchased by him from the railroad under special contract arrangements not to transfer or permit the use of such ticket by another person, in consideration of the sale of such ticket at a reduced rate of fare, in order to break the contract, is actionable. *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; *Railroad Co. v. McConnell, supra*. An examination of the authorities convinces me that it is quite well settled that jurisdiction may be retained over defendants as to whom a diversity of citizenship exists, and a dismissal of the complaint may, and in a proper case will, be permitted against defendants who are not found to be

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within the jurisdiction of the court, unless such defendants are indispensable to the entry of a decree against the remaining defendants, and when it may be done without prejudice. *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657; *Owley Stave Co. v. Coopers' International Union of North America* (C. C.) 72 Fed. 695; *Mason v. Dullaghan*, 27 C. C. A. 296, 82 Fed. 689; *Grove v. Grove* (C. C.) 93 Fed. 865; *Smith v. Oil Co.*, 30 C. C. A. 103, 86 Fed. 359.

The contention of counsel for defendants that the bill imperfectly and defectively charges fraudulent and wrongful acts by 61 defendants, rendering it impossible to separate any one of them or dismiss the bill as to any of them without injury and prejudice to the remaining defendants, is untenable. The defendants who are not diverse citizens from the complainant are not indispensable.

The question now arises, can this proceeding be maintained against the remaining defendants, and by a single bill? These objections are removed by the language of Judge Clark in the McConnell Case, where the facts are similar to the case at bar, at page 75, where he says:

"I think the defendants may properly be joined in one suit. Plaintiffs' business is the subject-matter in each bill, and the right claimed is exactly the same against all the defendants. The injury complained of is the same, and is being inflicted by defendants in the same method and at the same time."

The objection that the suit fails of jurisdiction because it is not shown that the defendants against whom the action may be continued have damaged complainant in a sum in excess of \$2,000 is overruled. It has been frequently held that in a suit in equity, where an injunction is sought, the amount in dispute is not the amount in controversy, but the value of the object to be gained by the bill. In the case of *Humes v. City of Ft. Smith* (C. C.) 93 Fed. 862, where an objection was made to the jurisdiction of the court because the amount in controversy did not exceed the sum of \$2,000, the court said:

"Jurisdiction is not determined in that way. Jurisdiction is determined by the value of the right to be protected, or the extent of the injury to be prevented, by the injunction."

[695] A court of equity will not require a pursuit of a legal remedy which foreshadows annoyance, accompanied

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by uncertain results and multiplicity of suits, to recover small sums from irresponsible defendants, where, as in this case, the damages caused by the alleged wrongful acts are not clearly susceptible of proof, and where the legal remedy that is afforded falls short of being complete and efficient. *Railroad Co. v. McConnell*, *supra*; *Insurance Co. v. Clunie* (C. C.) 88 Fed. 167; *Smith v. Bivens* (C. C.) 56 Fed. 352; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *De Forest v. Thompson* (C. C.) 40 Fed. 375. The complainant's papers, standing alone, disclose a proper case for the exercise of equitable relief.

I now come to consider a ground of objection to a preliminary injunction; not free from difficulty. I have given the subject most serious consideration, and am conscious of the great importance and far-reaching effect that its decision involves. Defendants contend that the complainant, in determining on the reduced rate of fare for a round-trip ticket on its road during the continuance of the Pan-American Exposition at Buffalo, ending with October 31, 1901, in conjunction with other railroad lines having facilities for transportation of passengers over its road to Buffalo, violated the provision of the act of congress of July 2, 1890, by which it is provided:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." 26 Stat. 209.

It appears from the affidavit of Mr. Lansing: That the complainant is a party to a combination which is engaged in pooling railroad rates and in fixing fares for railroad transportation in order to avoid competition between the several lines constituting the association known and distinguished as the "Trunk Line Association." This association has among its membership a constituted committee known as the "Trunk Line Committee." It is claimed that its membership consists of the complainant and eight other railroad corporations, citizens of different states, operating in the Middle states. The Trunk Line Association acts through a trunk line passenger committee, which is composed of the general passenger agents of the principal railroads operating in the territory reached by the several railroads which they

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represent. That the special Pan-American tickets referred to in the bill of complaint have been issued pursuant to such combination and conspiracy. That the rates and conditions of the tickets were previously arranged, and are a product of this combination organized to stifle competition in railroad rates. It further appears that the complainant and other railroads in combination are pooling the first and second class passenger business of their respective roads upon an agreed division of the receipts. The representative of the joint agency testified before the police court of the city of Buffalo in a proceeding brought against a ticket broker. It appears from his testimony, which is produced by the defendants, that the rates are fixed by the association, and that the complainant is a member thereof; that he is employed by this association in conjunction with the Central Passenger Association. The defendants' affidavits and exhibits have not been questioned or controverted on [696] the part of complainant. They stand admitted, therefore, upon this application for a continuance of the injunction. Defendants charge that the very ticket which is the ground of this application is the result and the evidence of an unlawful agreement between the different railroads composing the Trunk Line Association. This is not denied. The court cannot at this time pass upon the existence of this unlawful agreement, other than as it appears in the papers submitted. Were this at final hearing, when all the facts known to the complainant were divulged, the court might not be bound to seemingly protect the defendants in the pursuit of their nefarious practices, for such they admittedly are. The defendants do not deny the charges of wrongdoing. A court of equity would therefore be bound to raise its arm in defense of a complainant suffering wrongs which could be properly righted by the exercise of its power. But can the aid of a federal tribunal be invoked to protect the complainant in the issuance of a ticket over its railroad, which, as far as it appears to the court, is the culmination as well as the evidence of an agreement between railroad corporations specifically forbidden by an act of congress which has been sustained by the supreme court of the United States? *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540,

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41 L. Ed. 1007; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. The complainant contends that this charge made by the defendants does not avail, as the wrongdoing, if any exists, does not relate to the subject-matter. I am not convinced as to the soundness of this contention. Can the railroad complainant conspire unlawfully to fix rates, and then come into a court of equity and invoke its aid to protect those rates which are represented by the ticket presented to the court, and which is wrongfully used by the defendants? The evil practice which stands admitted by the papers is the very practice in which the court's protection is invoked. As was well said in *Insurance Co. v. Clunie* (C. C.) 88 Fed. 170:

"The maxim that he who comes into equity must come with clean hands has its limitations. It does not apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct, unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought."

See, also, *Beach*, Mod. Eq. Jur. 14-16; *Pom. Eq. Jur.* 397, 398; *Beck v. Real Estate Co.*, 12 C. C. A. 497, 65 Fed. 30; *Weiss v. Herlihy*, 23 App. Div. 608, 49 N. Y. Supp. 81; *Sinsheimer v. Garment Workers*, 77 Hun, 215, 28 N. Y. Supp. 321.

In the *Sinsheimer* Case an injunction was sought by plaintiffs, who were a combination of clothing manufacturers formed for mutual protection from the demands for higher wages of their employes, who were also organized for protection and for advancing their wages. The court said:

"Under the circumstances disclosed by the papers in this case, if the defendants were guilty of any violation of law, the plaintiffs were certainly equally implicated, and under this condition of affairs it is difficult to see [697] how they would have a right to the intervention of a court of equity. In dealing with questions of this nature the court should be studious to see that the rights of all parties are protected, and that the forms of law should not be permitted to be used on behalf of one party against another, when the party seeking the intervention of the court has been endeavoring to secure his ends by means similar to those which he seeks to enjoin on the part of his antagonist."

The wrongdoing of complainant, admitted by the papers,

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is not remote. It has given birth to the combination whose tickets have been wrongfully diverted by the defendants. This court has no sympathy with, nor would it lend its aid willingly to, those indulging in practices admitted by the defendants. But, sitting as a court of equity, it is bound by those rules which are the very foundation of that branch of our jurisprudence. The complainant does not come before the court with clean hands in the transaction complained of. The court can, therefore, not grant it equitable relief upon the state of facts before it at this time. The complainant must therefore be relegated to its remedies at law, and the injunction vacated. Let an order be entered accordingly.

ON REHEARING.

(October 14, 1901.)

Motion for reargument on notice to defendants was heard by me September 30, 1901. Affidavits were read in behalf of complainant, denying the charge of violation of the anti-trust act, the alleged pooling of business, and the apportionment or division of money received by various railroads for sale by them of reduced-rate Pan-American tickets. Defendants, in reply, read additional affidavits, corroborative of their charge of iniquitous conduct by the complainant with respect to the tickets in question. Answers in behalf of 38 defendants were served and filed, denying the commission of the wrongful acts charged in the complaint.

Important and difficult questions of law are involved in the determination of this motion. A disposition of it on the affidavits presented may fail of having the facts carefully examined and deliberately heard. The original motion for injunction was denied, for the reasons stated in the opinion of the court filed August 26, 1901. The Pan-American Exposition, on account of which the reduced-rate ticket was issued by the complainant and other roads associated with it, will close its gates on October 31st,—within 17 days. It is doubtful whether the necessity for immediate protection from alleged wrongful acts now exists. Inasmuch as the defendants have read additional affidavits and filed an

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answer corroborative of the charge of the existence of a combination in violation of law, the issues now raised ought not at this time to be disposed of summarily.

Motion for reargument denied as to defendants who have appeared and answered. Defendants who have not answered, of course, may be proceeded against in accordance with the ordinary rules of equity procedure.

[96] CENTRAL COAL & COKE CO. ET AL. v. HARTMAN.

(Circuit Court of Appeals, Eighth Circuit. September 30, 1901.)

[111 Fed., 96.]

MONOPOLIES—COMBINATIONS IN RESTRAINT OF TRADE—DAMAGES.—

Only actual damages, established by the proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable [under the Sherman anti-trust law (26 Stat. 209)]. Speculative, remote, or contingent damages cannot form the basis of a lawful judgment.

SAME—SPECULATIVE DAMAGES—EVIDENCE—SUFFICIENCY.—The estimates, speculations, or conjectures of witnesses unfounded in the knowledge of actual facts from which the amount of the damages could have been inferred with reasonable certainty will no more sustain a judgment than the conjectures of a jury.

SAME—ANTICIPATED PROFITS—WHEN RECOVERABLE.—The general rule is that the anticipated profits of a commercial business are too remote, speculative, and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to [97] this rule that the loss of profits from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his actual loss was.

SAME—PROFITS OF ESTABLISHED BUSINESS—EVIDENCE—INDISPENSABLE TO RECOVERY.—Proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business.

SAME—LOSS OF PROFITS.—The plaintiff testified that the acts of the defendants had greatly diminished his business, prevented him from making contracts for future delivery of coal, and diminished his sales from 15 to 20 carloads per month, on which he would have made a profit of from \$12 to \$20 per car; that he could not tell

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what the volume of his business was before or after the acts complained of, and that he had no books or papers which would show this fact. He produced no evidence of the expenses or income of his business before or after the acts complained of. *Held*, that the evidence was insufficient to sustain a verdict for damages for the loss of anticipated profits.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Western District of Missouri.

W. C. Perry (*Daniel B. Holmes, Adiel Sherwood, and John O'Grady*, on the brief), for plaintiffs in error.

Charles H. Nearing (*J. S. West and J. B. Campbell*, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and ADAMS and LOCHREN, District Judges.

SANBORN, Circuit Judge.

This was an action brought by Samuel Hartman against the Central Coal & Coke Company and several other corporations for three times the damages which he claimed that the defendants had inflicted upon his business by their violation of the inhibitions of the act to protect trade against unlawful combinations and monopolies, commonly called the "Sherman Anti-Trust Law" (26 Stat. 209, c. 647). His complaint was that he had been engaged in the sale of coal in Kansas City, in the state of Kansas, since 1893; that in September, 1896, he and the defendants had formed a coal club to establish and control the prices at which coal should be sold in Kansas City, Kan., and Kansas City, Mo., and to restrain commerce among the states; that they had accomplished their purpose; that he withdrew from the club in 1897; that thereafter the defendants and their associates would not sell him Salt Fork coal or Cherokee coal at any other prices than those which they had established for the sale of coal at retail to consumers; that this action of the defendants caused him a loss of all his trade in Salt Fork coal, of a large portion of his business in Cherokee coal, and made it impossible for him to make contracts for the future

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delivery of coal, because he was uncertain whether or not he could obtain it; so that he suffered damages in the sum of \$2,500. The defendants denied these averments, and at the close of the trial the jury found that the plaintiff's damages were \$130, and judgment was thereupon rendered [98] against the defendants for three times this amount, \$500 attorney's fees, and the costs of the action.

The assignment of errors challenges rulings of the court upon the construction of the act of congress upon the nature and extent of interstate commerce, and upon the sufficiency of the evidence of damages to warrant a verdict against the defendants. If no real legal injury was proved in this case, if there was actually no subject of this controversy, if this is really nothing but a moot case, any opinion we might render upon the grave questions relating to the construction of the act of congress and the character and extent of commerce among the states would be mere obiter dicta, and any discussion or decision of these questions in this action would be useless. For this reason the sufficiency of the evidence of damages to sustain the verdict will first be considered. The only damages claimed in the petition, and the only losses which the plaintiff sought to prove at the trial, were the loss of some of the expected profits of his business of buying and selling coal between January 1, 1897, and January 25, 1899. Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages. Now, the anticipated profits of a business are generally so dependent upon numer-

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ous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. *Howard v. Manufacturing Co.*, 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147; *Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co.*, 152 U. S. 200, 205, 14 Sup. Ct. 523, 38 L. Ed. 411; *Trust Co. v. Clark*, 92 Fed. 293, 296, 298, 34 C. C. A. 354, 357, 359; *Simmer v. City of St. Paul*, 23 Minn. 408, 410; *Griffin v. Colver*, 16 N. Y. 489, 491, 69 Am. Dec. 718. There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly income he derives from it for a long time before, and for the time during the interruption of which he complains. The interest [99] upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff has lost. One, however, who would avail himself of this exception to the general rule, must bring his proof within the reason which warrants

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the exception. He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced. 1 Sedg. Dam. § 183; *Red v. City Council*, 25 Ga. 386; *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58; *Greene v. Williams*, 45 Ill. 206; *Hair v. Barnes*, 26 Ill. App. 580; *Morey v. Light Co.*, 38 N. Y. Super. Ct. 185. And one who seeks to recover for the loss of the anticipated profits of an established business without proof of the expenses and income of the business for a reasonable length of time before as well as during the interruption is in no better situation. In the absence of such proof, the profits he claims remain speculative, remote, uncertain, and incapable of recovery. In *Goebel v. Hough*, 26 Minn. 252, 258, 2 N. W. 847, 849, the supreme court of Minnesota said:

"When a regular and established business, the value of which may be ascertained, has been wrongfully interrupted, the true general rule for compensating the party injured is to ascertain how much less valuable the business was by reason of the interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are."

The truth is that proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business. *Gobel v. Hough*, 26 Minn. 252, 256, 2 N. W. 847; *Chapman v. Kirby*, 49 Ill. 211, 219; 1 Sedg. Dam. § 182; *Ingram v. Lawson*, 6 Bing. N. C. 212; *Shafer v. Wilson*, 44 Md. 268, 278.

Did the plaintiff make any proof of this character at the trial below? The only evidence he offered relating to the damages which he claimed was his own testimony, and he directed this to four elements of injury which he evidently thought tended to show loss of profits, viz. loss of customers, diminution of supply of coal, decrease of volume of business, and the amount of his anticipated profits on sales that he did not make. According to his testimony, he had been in the business of buying and selling coal at Kansas City since 1893. He became one of the board of control of the coal club in 1896,

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and [100] withdrew from it in 1897. After his withdrawal he could not procure two kinds of bituminous coal known as "Salt Fork coal" and "Cherokee coal" unless he paid for it a price only 50 cents a ton less than the price to the consumers, notwithstanding the fact that the retail dealers who were members of the club could buy this coal at a price about \$1.25 per ton less than the price to the consumers. The reason why he could not buy this coal at the same rate as the members of the club was that they controlled the coal and its price, and they would not sell it to him at that price. His only testimony as to his loss of customers was that before he left the club he could and did make contracts for the future delivery of this coal; that after he withdrew he did not dare to do so, because he did not know that he could secure it; that there was some trade that would come to him for certain grades of coal; that he could not give these grades to those who came; that they did not want to come back, because they did not know whether they could get the coal or not; that his contract business on car-load lots before he withdrew from the club was one or two car loads a month, and that he did not know what it was on wagon loads. He produced no contracts he had ever made. He named no customer with whom he had ever had a contract, no customer whom he had lost. He did not testify how many customers had left him, nor the amount of coal which any or all of them had been accustomed to buy during the years from 1893 to 1897, when he had been receiving all this coal which he wished to procure. Here are no facts—no data—from which the number of customers or the amount of custom which he had lost can be lawfully inferred, none which make the amount of the contracts for future delivery which he did not make either reasonably or unreasonably certain, no basis for even a fair conjecture. He testified that he did not know himself what his customary contract business was and he produced no evidence from which the jury could learn. As to his transactions in Salt Fork and Cherokee coal, he testified that before he left the association he was selling from two to three car loads of Salt Fork coal per week during the winter time, and that this was the biggest part of his business,—nearly half of it. But, when the account books of the cor-

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poration from which he bought this coal were produced, they disclosed the fact that he purchased only four car loads during November and December, 1896, and only four car loads between December, 1896, and August, 1897, and he admitted that this might be a true statement of the amount of this coal which he handled during that winter, and he produced no books of account, no bills, no checks, no other evidence to explain the wildness of his conjecture that his business in this coal the winter before its interruption was from 26 to 39 car loads, when in fact it did not exceed 8. He testified that after he left the club he had a hard time to get Cherokee coal, but that he got some through other dealers, and that his business in this coal was two or three cars a week in the winter before he withdrew. But he produced no evidence to verify this statement, and no proof of the amount of the decrease of this business, if any, caused by the action of the club. There is no evidence in the record that the coal club in any way diminished his trade in any other coals [101] than the Salt Fork and the Cherokee. The plaintiff testified that their action did not disturb his trade in the anthracite and semianthracite coals, and that his business in these increased after the interruption of his trade in the Salt Fork and Cherokee. As to the volume of his general business and its decrease he testified that the better grades of coal he handled were in the association, and his failure to get them caused his business to run down so that he had hardly any; that he had only one grade of coal one winter; and that he could not do business after he left the club as he could the winter before. But he produced no evidence of the volume of his business, of its income, or of its expenses before or after the interruption. The only evidence he produced as to his expected profits was his own testimony that his ordinary profit on a car load of coal was from \$12 to \$20, and that he had his own place of business and his own teams. But the evidence disclosed the fact that this \$12 to \$20 was the difference between the amount he paid for a car load of coal and the amount which he retailed it for, and that it would be necessary to deduct from this alleged profit the proper proportion of the expenses of hiring the teamsters, maintaining the teams and the office, handling the coal, and

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operating the business, before the actual profit could be ascertained; and there was no evidence of the amount of these expenses. The plaintiff testified that he kept a ledger, in which he entered the charges of coal sold on credit, and that he had a bank account and a bank book, but he said that he had no books that would show how much coal he handled before or after the interruption, and he did not produce either his ledger or his bank book. Here are a few extracts from his testimony on cross-examination:

" Q. Now, you can't give us any details as to the amount your business was damaged, can you? A. Yes, I think I can make an estimate that it was three or four cars a week less during the season. Q. That would be your estimate? A. Yes, sir. Q. But you can't tell these gentlemen how many cars you handled less after that than you did handle while you were a member of the association, or before you were a member? A. Well, it would run between twelve and fifteen cars a month. * * * Q. And you can't tell the jury the number of cars of coal that you handled in 1898? A. No, sir. Q. All that you can say is that you think it is a little less than it was in the year 1896? A. Yes, sir. Q. But how much less you can't tell? A. No, sir. * * * Q. You haven't got any account, or any paper, or any book, or anything on earth to show how much you took in, or how much your expenses were, or how much you had to pay for your coal? A. I haven't got it here, but I expect I could come pretty near telling you what it was. Q. You haven't even got your cash book, to show how much you took in in any given time, have you? A. No, sir. Q. Or your journal to show how much you paid out? A. No, sir. Q. You haven't got any record to show how much coal you bought, or who you got it from, or when it was received? A. No, sir. * * * Q. Then you can't give any information from your books as to the amount of Cherokee coal you handled? A. No, sir. Q. And the same is true as to all other coal you have handled? A. Yes, sir. Q. So we will just have to take your word for it? A. Yes, sir. Q. Haven't you got a bank book? A. Yes, sir. Q. Where is that? A. It is over in my office. Q. Haven't you got the [weigh bills] for your coal? A. I had them, but I destroyed them. Q. Haven't you got those in 1898, when you thought about commencing this suit? A. I may have; but I didn't look after that part of the business. Q. Then the result of it all is that, so far as the extent of your business is concerned at any time, we can't get any light as to that from any books you kept? A. No, sir; not even from my check books and bank books. I don't keep them."

[102] These excerpts from the testimony demonstrate the fact that the basis of this judgment is nothing but the mere guess of an interested witness. Litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way. This plaintiff first estimated that he had lost the sale of from 9 to 13 cars of Salt Fork coal per month during the winter season after he withdrew from the club, and the same number of cars of Cherokee coal,

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or in the aggregate from 18 to 26 cars per month. On cross-examination he guessed again, and estimated that his loss was only from 12 to 15 cars a month. When the books of the Salt Fork Coal Company were produced, and showed that his purchases of that coal in the winter of 1896 had averaged less than 2 cars per month, he conceded that this might be correct, and that he might have overestimated his trade in this coal before he withdrew from the association at least 300 per cent.; that he had guessed 9 to 13 cars per month, when it was only 2. Testimony of this character is nothing but conjecture, and it presents no substantial evidence to make certain the profits that were lost, if any. Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts. The plaintiff in this case had his bank account at his command, which would certainly have given him some indication of the volume of his business before and after the interruption of which he complained. He had his ledger, in which he testified that he had entered the charges of the coal which he had sold on credit. The bank account and the ledger account together, if properly kept, would have given at least an approximate statement of the value of the coal which he handled, because one would have shown his cash receipts, the other his charges for coal sold on credit, and the payments he received for that coal, and a careful comparison of the two would have enabled any intelligent book-keeper to at least approximate the value of his business. These books were not produced. The indispensable facts to warrant a recovery of the expected profits of an established business were not established. There was no evidence of the amount of capital in the business, of its expenses or of its income, either before or after its interruption. There were no data for a rational estimate of the profits at any time during the continuance of the business; nothing from

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which the jury could reasonably infer that the business was profitable before, less profitable or profitless after, the plaintiff's withdrawal from the club. Much less were there any facts established which made the amount of the expected profits lost reasonably certain. The interested witness who alone estimated this loss himself testified that he knew no facts from which a rational finding could be made, and his testimony shows that his estimates were nothing but the wildest conjecture. The result is that the verdict is a speculation of the jury, based on the conjectures of an interested witness, unsupported by the proof, or the [103] knowledge of any facts from which the plaintiff's loss, or its amount, could lawfully or rationally be inferred, and it cannot be sustained.

The conclusion which has already been reached upon the sufficiency of the evidence of damages to sustain the verdict renders it both unnecessary and unwise to consider or discuss the other questions in this case. The nature of the evidence of damages introduced and withheld by the plaintiff renders it improbable that it will ever be necessary to consider the other issues of law which counsel have discussed.

The judgment below is reversed, and the case is remanded to the court below, with instructions to grant a new trial.

[156] FOOT v. BUCHANAN, UNITED STATES MARSHAL.

(Circuit Court, N. D. Mississippi, W. D. January 14, 1902.)

[113 Fed., 156.]

WITNESSES—EVIDENCE—INCRIMINATING—PROTECTION—CONSTITUTION—STATUTE.—Under the fifth amendment of the constitution of the United States, providing that no person shall be compelled in any criminal case to be a witness against himself, a witness before the grand jury cannot be required to answer as to his participation in, and knowledge of, a combination to regulate and control the price of cotton seed and the product and price of oil throughout certain states, in violation of the act to protect trade and commerce against unlawful restraints and monopolies (26 Stat. 209), notwithstanding Rev. St. § 860, providing that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or

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in any manner used against him in any court in any criminal proceeding, since such section does not exempt the witness from prosecution for the offense which may be disclosed by his testimony.

SAME—INTERSTATE COMMERCE ACT—VIOLATION—WITNESS—EXEMPTION FROM PROSECUTION—UNLAWFUL MONOPOLIES—PROHIBITION—APPLICABILITY OF EXEMPTION.—Act Cong. Feb. 11, 1893 (27 Stat. 443), providing that no person shall be excused from testifying in a proceeding growing out of an alleged violation of an act to regulate interstate commerce, approved February 4, 1887, on the ground that his testimony will tend to incriminate him, and that no person shall be prosecuted, etc., on account of anything concerning which he may testify in such proceeding, applies only to proceedings connected with the act of February 4, 1887, and does not apply to a prosecution for violation of the act to protect trade and commerce against unlawful restraints and monopolies (26 Stat. 209), so as to abrogate in relation thereto Const. U. S. Amend. 5, providing that no person shall be compelled in a criminal case to be a witness against himself.

SAME—QUESTION FOR JUDGE.—Where a witness claims that the answer to a question will tend to incriminate him, it is not for the witness, but for the judge, to decide whether, under all the circumstances, such might be the effect, and the witness entitled to the privilege of silence.

SAME—NATURE OF TESTIMONY.—Where a person has already been indicted for an offense about which he is to be examined as a witness, and the questions asked him tend [157] to connect him with such offense, the testimony sought is within the inhibition of Const. U. S. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself.

SAME—ASSURANCE OF SAFETY—RELINQUISHMENT OF PRIVILEGE.—Where a witness before a grand jury declines to answer certain questions, and is taken before the judge, who assures him that he can safely answer, as his testimony cannot be used against him, he is not compelled by such assurance to relinquish his constitutional privilege, where the answer may tend to criminate him.

SAME—CONTEMPT—COMMITMENT—HABEAS CORPUS—RELIEF.—Where a witness is committed for contempt in refusing to answer all of a series of questions, for the reason that the answers would tend to criminate him, and some of the answers would have that tendency, he should not be denied relief on habeas corpus because some of the questions might be safely answered.*

Habeas Corpus.

Lawrence Foot was subpoenaed as a witness before the grand jury for the district court of the United States for the Western division of the Northern district of Mississippi. He was sworn and examined

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in relation to violations of an act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 200). This act is intended to suppress conspiracies or trusts in restraint of trade, and it provides that every person who shall violate its provisions shall, on conviction, be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or both, in the discretion of the court. The assistant United States attorney propounded to the witness a number of questions, among which were the following:

"State whether or not you attended any meeting, called either at Memphis or New Orleans or Meridian or elsewhere, in the early part of this fall, or at any time within the past eighteen months, to discuss fixing a price upon cotton seed, or the products of cotton seed?

"Has your mill, or any other, to your knowledge, contributed anything to the selection of a committee whose duty it is to see that the various mills in the states of Mississippi, Louisiana, and Tennessee keep up a uniform rate on cotton seed and its products?

"If your mill should immediately advance the price of cotton seed, or lower the price of products, would you be subject to any sort of forfeiture, censure, or supervision from any source whatever?

"Is there any sort of understanding existing between the mills in Mississippi, Tennessee, or Louisiana, either written or verbal, by which the various mills are to be allowed to press a certain amount of seed; and, in the event any greater amount is pressed by any mill, is there any obligation on the part of such mill to account for the same to any committee whose duty it is to look after such matters?

"Is it not a fact that within the past six months one oil mill will not invade what is known as the 'territory' of another oil mill to purchase seed; and is it not a fact that all the mills in a certain territory have an agreement whereby each day, or every few days, they communicate with each other over the telephone, by letter, or otherwise, and inform each other what they are paying for seed, or what they intend to pay next day or next week, and by virtue of such communications or agreements do not all the mills pay the same price for seed and sell all products within such territory at the same price, and has this not been the practice this fall?

"During the past six months has there existed an agreement between the oil mills of Memphis, or those of Mississippi, Tennessee, and Louisiana, that you will all be governed, in purchasing cotton seed and selling the products thereof, by the Memphis or New Orleans market, and do you strictly adhere to said agreement?"

The witness refused to answer these questions, and gave as the reason for his refusal that "in answering the questions he would criminate himself, and put the government in possession of information as to the details of [158] said alleged combine and agreement, and the names of parties and witnesses, which might supply the means of convicting him of the same offense." For this refusal to answer, on report of the grand jury, the witness was carried before the district court, where he repeated his reasons for declining to answer. The court required the witness to return to the grand jury and answer the questions, and, on his refusal to obey the order of the court and answer the questions, he was committed to jail, "there to remain from day to day and term to term of this court until he shall answer said interrogatories, or be otherwise discharged by due course of law." Being in the custody of the United States marshal for the Northern district of Mississippi under this order of the court, he filed a petition for the writ of habeas corpus. The petition alleges the facts which have been stated, and also, on information and belief, that the petitioner "at the time of his refusal to answer the questions propounded to him by the grand jury aforesaid, and at

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the present time, stands indicted in the district court of the United States at Jackson, Mississippi, for the same identical offense which the grand jury was seeking to investigate in propounding the questions aforesaid to your relator." The writ was issued, and the return of the marshal shows that the petitioner was held under the said order of the court. The United States attorney, who, by order of the judge granting the writ, was notified of the proceedings, filed the following addition to the marshal's return: "We admit that the questions in the petition were asked, but deny that the defendant is entitled to the relief sought, and state the facts to be that the defendant was assured by the court that no information given by him in answer to the questions would or could be used against him in any prosecution in any United States court in this state. And we deny that the defendant knew of any indictment against him at the time the questions were asked, etc., but admit that he was under indictment."

A. K. Foot and James Stone (J. C. Wilson, on the brief),
for petitioner.

M. A. Montgomery, United States Attorney, for respondent.

SHELBY, Circuit Judge (after stating the case as above).

1. It is a rule of the common law that a witness will not be compelled to answer any question, the reply to which would supply evidence by which he could be convicted of a criminal offense. This doctrine was firmly implanted in the common law of Great Britain and of the colonies long before the adoption of the constitution of the United States. The principle is held so sacred in this country that it is embodied in the respective constitutions of all the states, as well as in the federal constitution. The principle, as applied to this case, is found in the fifth amendment to the constitution: "No person shall be compelled in any criminal case to be a witness against himself." The question here is, does this provision protect the petitioner in declining to answer the questions propounded to him? The general power of the court to punish a witness for contempt who refuses to answer is unquestioned. But that power is limited by the language quoted from the constitution. Any exercise of jurisdiction or power violative of this provision is void, and the witness imprisoned by an order made in excess of the court's authority is entitled to be discharged on the writ of habeas corpus. *Ex parte Fisk*, 113 U. S. 713, 5

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Sup. Ct. 724, 28 L. Ed. 1117; Rev. St. § 752. Was the order of the district court requiring the petitioner to answer these questions, and committing him for his refusal to answer, in excess of the court's authority?

In 1890 Charles Counselman was subpoenaed before the United [159] States grand jury for the Northern district of Illinois which was engaged in investigating alleged violations of an act to regulate commerce, approved February 4, 1887 (24 Stat. 379). Questions were propounded to him, the answers to which would tend to criminate him. He declined to answer, and was carried before the court. The court held (Judge Gresham presiding) that section 860 of the Revised Statutes of the United States provided that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him, in any court of the United States, in any criminal proceeding, and that he was fully protected by this statute; that therefore he should be required to answer. It was held, in view of this statute (Rev. St. § 860), that the witness could not claim the privilege of silence under the fifth amendment of the constitution. Counselman's petition seeking to be discharged on habeas corpus was dismissed, and he was remanded to the custody of the marshal. *In re Counselman* (C. C.) 44 Fed. 268. Counselman took an appeal to the supreme court. The decision of the lower court was reversed. The supreme court held that the witness could not be required to answer. Referring to section 860, the supreme court said:

"It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which would be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." And again: "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecutions for

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the offense to which the question relates." The court concluded: "From a consideration of the language of the constitutional provision, and of all the authorities referred to, we are clearly of opinion that the appellant was entitled to refuse, as he did, to answer." *Counselman v. Hitchcock*, 142 U. S. 547, 504-585, 12 Sup. Ct. 195, 198-207, 35 L. Ed. 1110, 1114-1122.

By the unanimous judgment of the supreme court the appellant, Counselman, was discharged from custody.

That case seems conclusive of the case at bar. But the learned district attorney contends that "the case of *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, is virtually a repeal of the case of *Counselman v. Hitchcock*." Is that contention true? After the opinion in *Counselman v. Hitchcock* was rendered, the congress passed an act, approved February 11, 1893, to give immunity to witnesses in certain cases. It provides, in brief, that no person shall be excused from testifying in interstate commerce actions, or from producing books, papers, contracts, etc., before the interstate commerce commission, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of congress entitled "An act to regulate commerce," ap- [160] proved February 4, 1887, on the ground or for the reason that the testimony or evidence required of him would tend to criminate him or subject him to a penalty or forfeiture, and that no person shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he may testify or produce evidence before said commission, or in obedience to its subpoena, or in any such case or proceeding, 27 Stat. 443. The supreme court having decided that section 860 of the Revised Statutes did not confer complete indemnity on witnesses, this act was evidently passed to confer such indemnity in the cases to which it refers. The act has no application to the case at bar. It is confined by its terms to proceedings connected with "An act to regulate commerce," approved February 4, 1887, and amendments thereto. The petitioner in the case at bar was examined before the grand jury in reference to offenses under "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (26 Stat. 209; 1 Supp. Rev. St. p. 762). In the case of *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, cited by the district attorney,

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the court construed the act of February 11, 1893 (27 Stat. 443). The court held (four of the justices dissenting) that the act affords absolute immunity to the witness in the cases to which the act relates against prosecution, state or federal, for the offense about which the witness is examined, and deprives the witness of his constitutional right to refuse to answer. This act, as we have said, by its terms is confined to a certain class of cases, and has no application to the case at bar. There is no statute applicable to the case at bar which tends to protect the witness, except section 860 of the Revised Statutes, and that has been held by the supreme court not to afford the protection furnished by the constitution. The principle established by the decision in *Counselman v. Hitchcock*, so far as it is applicable to the case at bar, is unaffected by the opinion of the court in *Brown v. Walker*. The result of the two cases is (1) that since the statute of February 11, 1893 (27 Stat. 443), parties or witnesses in cases or proceedings under the act of February 4, 1887 (24 Stat. 379), to regulate commerce, and amendments thereto, may be required to answer questions that tend to criminate the witness or party; but (2) witnesses or parties in other cases may not be required to answer criminating questions, because section 860 of the Revised Statutes does not afford complete indemnity to the witness or party. The first result is established by a bare majority in *Brown v. Walker*. The second proposition is established without dissent in *Counselman v. Hitchcock*.

2. It is true that the witness cannot avoid answering questions upon his mere statement that his answers to them will tend to criminate him. It is for the judge to decide whether his answer will reasonably have such tendency, or whether it will furnish an element or link in the chain of evidence necessary to convict him. In determining whether or not the witness is entitled to the privilege of silence, the court may look at all of the circumstances of the case, and determine whether or not there is reasonable ground to apprehend danger to the witness from his being compelled to testify. If the fact that the witness is in danger appears, great latitude should then be allowed to him in judging for himself of the effect of any particular question. A question

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which might appear at first a very slight and innocent one might, by establishing a link in a chain of evidence, become the means of convicting the witness. *Ex parte Irvine* (C. C.) 74 Fed. 954. In the case at bar it appears that the defendant was already indicted for the offense about which he was examined, and the questions tended to connect him with the offense for which he is indicted. There can be no doubt that under such circumstances, when the questions are such as seek to connect him with the crime under investigation, the court will not require him to answer them.

3. It is set up in the answer filed by the district attorney that the petitioner, when carried before the court upon his failure to answer questions before the grand jury, was assured by the court that no information given by him in his answers to the questions would or could be used against him in any prosecution in any court of the United States. The petitioner could not be required to waive his constitutional privilege upon such an assurance by the court. He has a right to stand upon his constitutional privilege, notwithstanding such assurance, and to remain silent whenever any question is asked, the answer to which may tend to criminate him. *Temple v. Com.*, 75 Va. 892.

4. It is argued by the district attorney that some of the questions asked (we have not stated them all) could have been answered without endangering petitioner, and that, if any one of them did not call for a criminating answer, he is not entitled to relief. We can not accept that view. He was carried before the court, and the court required him to answer all of the questions. He is under commitment for refusal to answer all. It was one examination, relating to one subject, and the questions culminated in an effort to show the witness' connection with the misdemeanor charged. Where there is a series of questions, the examiner cannot "pick out one, and say, if that be put, the answer will not criminate him." If it is one step having a tendency to criminate him, he is not compelled to answer. *People v. Mather*, 4 Wend. 230, 254; *Paxton v. Douglas*, 16 Ves. 240, 243.

The act to protect trade and commerce against unlawful restraints and monopolies is the law of the land, and should

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be enforced. We would make no order that would tend to obstruct its proper enforcement. It confers jurisdiction on the United States courts, and provides a remedy in a civil action "by way of petition setting forth the case, and praying that such violation shall be enjoined or otherwise prohibited." 26 Stat. 209, § 4. This provision does not prevent the criminal prosecution of those guilty of its violation. But the procedure against violators of the act must conform to law. The penalties of fine and imprisonment provided by the act may be imposed by the same procedure sustained by the same kind of evidence, either direct or circumstantial, that is admissible in prosecutions for other misdemeanors, and it ought not to be necessary, and certainly is [162] not permissible, to resort to methods in conflict with the constitutional rights of the citizen.

It is ordered that the petitioner, Lawrence Foot, be discharged from custody. Petitioner discharged.

PARDEE and McCORMICK, Circuit Judges, who were present at the hearing of this case. concur in this opinion.

[1020] METCALF v. AMERICAN SCHOOL FURNITURE CO. ET AL.^a

(Circuit Court of Appeals, Second Circuit. February 4, 1902.)

[113 Fed., 1020.]

Appeal from the Circuit Court of the United States for the Western District of New York

Frederick Seymour for appellant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree affirmed in open court, with instructions to allow plaintiff 30 days to amend, on payment of costs. For opinion below, see 108 Fed. 909.^b

^a Demurrers to bill as originally filed sustained by the Circuit Court (108 Fed., 909). See p. 75. Decree affirmed by the Circuit Court of Appeals, Second Circuit (113 Fed., 1020). Amended bill dismissed (122 Fed., 115). See p. 234.

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[27] W. W. MONTAGUE & CO. ET AL. v. LOWRY ET AL.^a

(Circuit Court of Appeals, Ninth Circuit. February 17, 1902.)

[115 Fed., 27.]

MONOPOLIES—ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF INTER-STATE COMMERCE.—The Tile, Mantel & Grate Association of California was organized by defendants, who were dealers in tiles and similar articles, for the declared purpose of uniting "all acceptable dealers" in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of 200 miles), and all American manufacturers of tiles and fireplace fixtures. The articles prescribed that other local dealers who had an established business and carried a stock of a stated value, and who were "acceptable," might, on motion of a member, be permitted to join, and that all manufacturers of tiles in the United States might become members by signing the constitution and paying an entrance fee. The local members were bound by the articles not to buy goods from any manufacturer who was not a member, nor to sell goods to other dealers not members, at less than list price, which was about double the market price, and the manufacturing members were bound not to sell to any dealer within the prescribed territory who was not a member. *Held*, that such association was a combination in restraint of trade among the states, illegal under section 1 of the anti-trust act of July 2, 1890 (26 Stat. 209), and also an attempt to monopolize a part of the trade and commerce among the states, within the prohibition of section 2, by shutting out from such trade all local dealers who were not members, and that defendants were liable in damages, under section 7 of the act, to such a dealer to whom a manufacturer in another state refused to sell tiles, as it had previously done, on the sole ground that such dealer was not a member of the association.^b

In Error to the Circuit Court of the United States for the Northern District of California.

See 106 Fed. 38.

The writ of error in this case is brought to review the judgment of the circuit court rendered in an action which the defendants in error brought against the plaintiffs in error under the act of congress of July 2, 1890 (26 Stat. 209), commonly known as the "Sher-

^a Begun in the Circuit Court for the Northern District of California, and there entitled *Lowry v. Tile, Mantel & Grate Ass'n. of Cal.* Demurrer overruled (98 Fed., 817). See vol. 1, p. 995. Charge to jury (106 Fed., 38). See p. 53. Judgment affirmed by the Circuit Court of Appeals, Ninth Circuit (115 Fed., 27), where the title of the case was changed to *Montague & Co. v. Lowry*. Affirmed by Supreme Court (193 U. S., 38). See p. 327.

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man Anti-Trust Act." The complaint alleged that the plaintiffs therein had been injured in their business by reason of the illegal combination between the defendants therein made under the name of the Tile, Mantel & Grate Association of California. The substantial facts alleged in the complaint and proved on the trial were that for a number of years prior to the year 1898 the defendants in error had been engaged in the business of buying and selling and setting tiles, mantels, [28] and grates in the city of San Francisco, and that the tile which they used in their business was purchased from some of the various tile manufacturers in the states of Ohio, Indiana, Kentucky, New Jersey, and Pennsylvania, who subsequently entered into the association, there being no manufactures of tiles in the state of California; that by industry and attention thereto the defendants in error had established a profitable business; that in the year 1898 the plaintiffs in error formed the association, the object of which, as declared in its articles, was "to unite all acceptable dealers in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of two hundred miles), and all American manufacturers of tiles, and by frequent interchange of ideas advance and promote the mutual welfare of its members." As to membership, it provided that any individual, corporation, or firm engaged in the tile, mantel, and grate business in San Francisco, or within a radius of 200 miles therefrom, having an established business, and carrying not less than \$3,000 worth of stock, and having been proposed by a member in good standing and elected, and having signed the constitution and by-laws, and paid an entrance fee of \$10, might become a member. It was also provided that all manufacturers of tiles and fireplace fixtures throughout the United States might become nonresident members upon the payment of an entrance fee and signing the constitution and by-laws. Section 7 of the by-laws forbade members of the association to purchase goods from any manufacturer unless the latter were a member of the association, and forbade them to "sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association." It provided, further, that any manufacturer selling goods to others than members of the association should forfeit membership. It was shown that the list price referred to in section 7 was a nominal catalogue price of goods fixed by the manufacturers for convenience, but that in selling to members of the association, and, prior to forming the association, in selling to the trade generally, the manufacturers had allowed large discounts from the list prices amounting to something more than 50 per cent. thereof. The defendants in error alleged in their complaint that it required the unanimous consent of the association to become a member thereof, and that by reason of certain business difficulties there were members of the association who were antagonistic to them, and who would not have permitted them to join if they had applied, and that they were not eligible to join the association for the further reason that they did not carry at all times stock of the value of \$3,000. They also alleged that the association constituted a trust and conspiracy in restraint of interstate trade and commerce, and a monopoly of the grate, tile, and mantel trade between the parties engaged therein. The jury found damages for the defendants in error in the sum of \$500, and for that amount judgment was rendered in their favor, and for the further sum of \$750 for an attorney's fee, which was allowed by the court.

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P. F. Dunn and Linforth & Whitaker, for plaintiffs in error.

J. C. Campbell, W. H. Metson, and R. W. Campbell, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Two questions are presented upon the writ of error—First, did the association constitute a combination which was within the prohibition of the act of July 2, 1890? And, second, was the amount of the attorney's fee allowed by the court excessive? In answering the first question, we must first take into the account the declared purpose of the association. It was formed to unite all acceptable dealers engaged in the tile, grate, and mantel business in San Francisco, and within a radius of 200 miles therefrom, and all American manufacturers of tiles. In its scope it included upon the one hand every manufacturer of tiles wherever situate in the United States, and upon the other the six firms of local dealers who joined the association at its formation, together with those who might be permitted thereafter to become members. The defendants in error were not invited to enter into the combination. The rules prescribed that others in the same line of business, who had an established business and carried stock of the value of \$3,000, and who were "acceptable," might upon the proposition of one who was already a member, and upon the vote of the association, be permitted to join the combination. The evidence shows that the defendants in error after the formation of the association made efforts to purchase tile from manufacturers in Indiana with whom they had before been doing business, and that their orders were declined, and they were notified that they could not purchase goods from the manufacturers unless they became members of the association. They could not obtain tile from the local dealers in San Francisco unless they paid the "list" price, which was more

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than double the price which members of the association were required to pay.

We think that, in the light of these facts, the association clearly comes within the prohibition of the act of congress. It has a direct tendency to restrain trade between the different states and to create a monopoly. In principle it would be the same if it were an association between all the manufacturers of the United States in that line of goods and a single dealer in California, whereby all other resident dealers were shut out and all competition between local dealers extinguished. Section 1 of the act of July 2, 1890, provides as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal;" and it proceeds to denounce a penalty against any one who shall make any such contract or engage in any such combination or conspiracy. Interstate commerce "includes the purchase, sale and exchange of commodities" (*Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. 828, 29 L. Ed. 158); and every agreement which has the tendency to restrain the purchase, sale, and exchange of commodities is brought within the prohibition of the statute (*Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 238, 20 Sup. Ct. 96, 44 L. Ed. 136). The combination in the case before the court evidently tended to restrain trade. The defendants in error who had been regular purchasers of goods from the manufacturers were shut out from dealing with them from the time when the association was formed. Their orders to the manufacturers for goods were rejected for the express reason and for no other reason than that they were not members of the association.

The tendency of the combination was also to create a monopoly in the hands of the local members thereof. Section 2 of the act includes within its prohibition "every person who shall monopolize or attempt to monopolize or conspire with any other person or persons to monopolize any part of trade or commerce among the several states or with foreign nations." The combination in the case before the court [30] was not one such as might lawfully have been made between the residents of a single state for the purpose

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of regulating the methods of conducting their business or fixing the prices of goods or for other legitimate purposes, such as was sustained by the court in *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, where it was held that an agreement between manufacturers in a state bore no distinct relation to commerce between the states or with foreign nations, but it is one that brings within its scope not only local dealers, but all the wholesale dealers in the same kind of goods in all the states. Said the court in *U. S. v. E. C. Knight Co.*, 156 U. S. 16, 15 Sup. Ct. 255, 39 L. Ed. 325: "It is not essential that the result of the combination be a complete monopoly. It is sufficient if it merely tends to that end and to deprive the public of the advantages which flow from competition." The local members were bound by the articles of the association not to sell goods to nonmembers except at prices which were more than double the prices which the members paid and which all dealers had paid before the association was formed, and the manufacturers were bound not to sell to nonmembers at any price or under any conditions. The testimony indicated that the defendants in error had been in constant competition with the San Francisco firms which entered into the association, and had bid against them on contracts for work. The formation of the association shut off all such competition. The defendants in error were powerless to compete with local firms which possessed such advantages over them. The necessary effect of the combination was to crowd out of business every local dealer who was not a member, and thereby to create a monopoly in the hands of those who were. It is argued that the defendants in error might have joined the association had they chosen to do so, and that thereby they might have availed themselves of the privileges of membership. To this it is sufficient to say that it does not appear that they would have been admitted to membership if they had applied. Under the by-laws they were not eligible, for the reason that they did not at all times carry the requisite amount of stock, and if they had possessed the necessary amount of stock they had no assurance that they were "acceptable" to the members. On the contrary, the fact that they were not invited to enter the combination when

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it was formed was a distinct intimation to them that they were not acceptable. But it is immaterial whether they would or would not have been admitted into the combination. To protect their business and secure their legal rights they were not obliged to submit an application for membership in such a combination with the possibility of its rejection, or to submit themselves to the rules and exactions of the association. It is clear, also, that the tendency of the combination was to prevent others from engaging in the business. No one could become a member who had not "an established business," and it is too evident to admit of denial that no one could establish a business in competition with the members of the association who possessed such advantage in dealing with the manufacturers.

It is earnestly contended that the case in its principle comes within the doctrine of *Hopkins v. U. S.*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, and *Anderson v. Same*, 171 U. S. 604, 19 Sup. Ct. 50, [31] 43 L. Ed. 300; but we think it is clearly distinguishable from those cases. In the *Hopkins Case* the association, which was claimed to have been formed in violation of the act, was a local voluntary association of men whose business it was to receive at Kansas City consignments of cattle shipped from owners in various states, and to feed, prepare for market, and sell the same, and pay the owners their portion of the proceeds after deducting charges and expenses. The rules of the association forbade members to buy stock from one who was not a member or to transact business with any person who violated its rules and regulations. The court held that the business of the members of the association was not interstate commerce, and that the agreements or contracts relating to their business were not in restraint of interstate trade, for the reason that trade between the states was not affected by the combination, which was a purely local one, comprising only members of the state in which it was formed. The *Anderson Case* was similar to the *Hopkins Case*, with the exception that the members of the association were purchasers of certain classes of live stock instead of agents for the sale thereof. There was no association or combination between such purchasers and the vendors of the stock, and

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no monopoly was created or was intended to be thereby created. The association itself transacted no business. The court said:

"Those who are members thereof compete among themselves and with others who are not members for the purchase of the cattle, while the association itself has nothing whatever to do with transportation nor with fixing the prices for which the cattle may be purchased or thereafter sold. * * * A lessening of the amount of the trade is neither the necessary nor direct effect of its formation, and in truth the amount of that trade has greatly increased since the association was formed, and there is not the slightest evidence that the market prices of cattle have been lowered by reason of its existence. There is no feature of monopoly in the whole transaction."

The difference between those cases and the case at bar is apparent. The resident members of the Tile, Mantel & Grate Association, while they may compete with themselves, have no competition with those who are not members, for the latter are practically excluded from doing business within the portion of the state of California which is included in the prescribed area; and instead of being a combination between purchasers only, as was the fact in the Anderson Case, it is a combination between manufacturers and buyers of different states, which brings together on the one hand all the wholesale dealers in the United States in that line of goods, and on the other hand the chosen few who are permitted to obtain goods and supply the local demand.

We find no ground for disturbing the finding of the circuit court concerning the amount of the attorney's fee to be allowed to the defendants in error.

The judgment is affirmed.

[540] CONNOLLY *v.* UNION SEWER PIPE COMPANY.^a

ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 46. Argued April 22, 23, 1901.—Decided March 10, 1902.

[184 U. S., 540.]

If a claim is made in the Circuit Court that a state enactment is invalid under the Constitution of the United States, and that claim

^a Decision in the Circuit Court (99 Fed., 354). See p. 1.

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is sustained or rejected, this court may review the judgment, at the instance of the unsuccessful party.

If the alleged combination in this case was illegal, it would not follow that they could, at common law, refuse to pay for pipes bought for them under special contracts.

The contracts between the plaintiff and the respective defendants were collateral to the agreement between the plaintiff and other corporations, etc., whereby an illegal combination was formed for the sale of sewer pipe.

The first special defence in this case, based alone upon the principles of the common law, was properly overruled.

The special defence, based upon the act of Congress of July 2, 1890, 26 Stat 209, was also properly rejected. That act does not declare illegal or void any sale made by such combination or its agents of property acquired for the purpose of being sold, such property not being at the time in the course of transportation from one State to another, or to a foreign country; and the buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination, which might be restrained or suppressed in the mode prescribed by the act of Congress.^a

[46 L. ed., 679.] ^b

[The illegality, at common law, of a combination formed by corporations and persons in restraint of trade, does not preclude it from recovering the purchase price of goods sold in the course of business.]

[A violation of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. L., 209, chap. 647), by the formation of a combination in restraint of trade, by which a penalty is incurred under the statute, does not preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods.]

[A recovery of the treble damages authorized by the Sherman Anti-Trust Act of July 2, 1890, § 7 (26 Stat. L., 209, chap. 647), in case of injury sustained by violation of the act, can be had only by direct action, and not by way of set-off in an action brought for the price of goods by a company illegally formed in violation of the act—especially when the State practice does not permit the set-off of unliquidated damages.]

[A discrimination in favor of agricultural products or live stock in the hands of the producer or raiser made by the Illinois trust act

^a The foregoing syllabus copyrighted, 1902, by the Banks Law Publishing Co.

^b The following paragraphs inclosed in brackets are taken from the syllabus to this case in the United States Supreme Court Reports, Book 46, p. 679. Copyrighted, 1902, by The Lawyers' Co-Operative Publishing Co.

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of June 20, 1893, exempting them from the provisions which prohibit a recovery of the price of articles sold by any trust or combination formed in restraint of trade or competition in violation of that act renders the act repugnant to the provisions of the U. S. Const., 14th Amend., in respect to equal protection of the laws.]

[An elimination of the unconstitutional portion of the Illinois trust act of June 20, 1893, which exempts agriculturists and live-stock dealers from the provisions which prohibit combinations in restraint of trade, can not be made without bringing these classes of persons within the prohibitions of the statute, in contravention of the legislative intent, and therefore the entire act must be held invalid.]

THE case is stated in the opinion of the court.

Mr. Henry D. Coghlan for plaintiffs in error. *Mr. Joseph A. O'Donnell* was on his brief.

[541] *Mr. Herbert Hamlin* and *Mr. Edwin Walker* for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The Union Sewer Pipe Company—a corporation organized under the laws of Ohio and doing business in Illinois—brought its action against Thomas Connolly, a citizen of Illinois, in the Circuit Court of the United States for the Northern District of Illinois, on two negotiable promissory notes both executed at Chicago by the defendant; one, dated December 15, 1894, the other dated January 15, 1895, and each payable to the order of the plaintiff corporation ninety days after date at the First National Bank of Chicago.

These notes were given on account of the purchase by the defendant from the plaintiff of sewer pipe commonly known as standard Akron pipe, at prices agreed upon between the parties.

The Pipe Company also brought an action in the same court against William E. Dee, a citizen of Illinois, upon an open account for \$2389.26, the value at agreed prices of certain pipe purchased by him from the plaintiff in June, 1896. The plaintiff supplied the pipe under a written contract executed between it and the defendant in Illinois under date of August, 1895.

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Each of the defendants filed a plea of the general issue, with notice of special defences and of set-off.

The special defences in each case were substantially the same. The notice in the Connolly case was that the defendant on the trial of the action would rely on these special matters:

"First. That the plaintiff is, and at all times since about the first day of January, 1893, has been a trust or combination of the capital, skill and acts of divers persons and corporations carrying on a commercial business in the States of Ohio and Illinois and between said States and elsewhere in the United States of America, and organized for the express purpose of unlawfully and contrary to the common law creating and carrying out restrictions in trade, to wit, in the trade of buying, selling and otherwise dealing in certain articles of merchandise, to wit, sewer and drainage pipes, and also for the express purpose of [542] unlawfully and contrary to the common law limiting the production of said articles of merchandise and increasing the market price thereof; and also for the express purpose of unlawfully and contrary to the common law preventing competition in the manufacture, making, transportation, sale or purchase of said articles of commerce; also for the express purpose of unlawfully and contrary to the common law fixing standards or figures whereby the prices of said articles of merchandise intended for sale, use and consumption in this State should be controlled and established; and also for the express purpose of unlawfully and contrary to the common law being a pretended agency whereby the sale of said articles of commerce should and might be covered up and made to appear to be for the original vendors thereof, and so as to enable the original vendors or manufacturers thereof to control the wholesale and retail price of such articles of commerce after the title thereto had passed from such vendors or manufacturers; and for the further express purpose of unlawfully and contrary to the common law making and entering into and carrying out a certain contract or certain contracts by which the several persons or corporations forming the plaintiff, or being the pretended stockholders thereof, to wit, have bound

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themselves not to sell, dispose of or transport said article of commerce below certain common standard figures or card or list prices in excess of the true market values thereof, and by which they have agreed to keep the prices of said articles of commerce at certain fixed or graduated figures, and by which they have established certain settled prices of said articles of commerce between themselves and others, so as to preclude a free and unrestricted competition among themselves and others in the sale and transportation of said articles of commerce, and by which they have agreed to pool, combine and unite any interests they may have in connection with the sale and transportation of said articles of commerce so that the prices thereof may effect advantageously to themselves; that all of the claims of the plaintiff against the defendant in this action arise wholly out of and are in respect of sales of said articles of merchandise made between the 1st day of January, A. D. 1893, and the 1st day of March, 1896, to this defendant by [543] the plaintiff in the ordinary course of its business as such a trust or combination acting as aforesaid, and that this action is brought to recover the alleged price thereof and for no other purpose.

“Secondly. That the plaintiff is and at all times since the 1st day of January, 1893, was a combination in the form of a trust, in restraint of trade and commerce among the several States, and doing business as such throughout the United States and between the States of Ohio and Illinois, contrary to the provisions of an act of Congress of date of July 2, 1890, and entitled ‘An act to protect trade and commerce against unlawful restraints and monopolies,’ and that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business as such a combination, as aforesaid, in violation of the provisions of said act.

“Thirdly. That the plaintiff is and at all times since the 1st of January, 1893, was a trust doing business as such in the State of Illinois and elsewhere, contrary to the provisions of an act of the legislature of the State of Illinois entitled ‘An act to define trusts and conspiracies against trade, declaring

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contracts in violation of this provision void, and making certain acts and violations thereof misdemeanors, and prescribing punishment thereof and matters connected therewith, approved June 20, 1893, in force July 1, 1893;’ that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business in violation of the provisions of said act, and that the defendant hereby pleads said act in defence to this action and the whole thereof.”

The set-offs claimed by Connolly were: Treble the amount of the actual damages sustained and allowed by the act of Congress of July 2, 1890, c. 647, known as the Sherman anti-trust act, \$56,970.44; actual damages sustained by reason of the violation by the plaintiff of the provisions of the Illinois statute of July 1, 1893, \$17,323.48; and for money had and received by plaintiff of defendant contrary to law, \$17,323.48.

The set-offs claimed by Dee were of like character but of larger amounts.

[544] Both cases were, by agreement, submitted to the same jury and were treated as one consolidated case. At the trial the defendants respectively asked leave to amend their notices of special defences, but leave was denied.

The Circuit Court disallowed both the first and second of the above special defences, and in respect of the third its decision was that the Illinois Trust statute of 1893 was in violation of the Constitution of the United States. It consequently directed the jury to find a verdict for the plaintiff in each case; in the Connolly case, for the amount of the two notes sued on; in the Dee case, for the amount of the plaintiff’s open account against him. Verdicts having been returned as directed, and a motion for new trial in one case and motions for new trial and in arrest of judgment in the other, having been overruled, judgments were rendered on the verdicts.

1. The defendant in error insists that these cases should have gone to the Circuit Court of Appeals, and has moved on that ground that the writ of error be dismissed. The defence in each case was based in part on the Illinois statute of 1893. The plaintiff insisted at the trial that that statute was in vio-

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lation of the Constitution of the United States, and its position was sustained by the Circuit Court. There have been suits in which the Circuit Court upon the claim of the defendant has applied the Constitution of the United States to the case before it and put the plaintiff out of court. Here, the plaintiff claimed that the state enactment upon which defendants relied was unconstitutional, and its position upon that point was sustained. In *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 477, this court said: "The Circuit Court of Appeals Act does not declare that the final judgment of a Circuit Court in a case in which there was a claim of the repugnancy of a state statute to the Constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is made in the Circuit Court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court [545] review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant. It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the Circuit Court in every case in which a claim is made that a state statute is in contravention of the Constitution of the United States." Upon the authority of that case, the motion to dismiss is denied.

2. The defendant Connolly purchased Akron sewer pipe from the plaintiff and for the agreed price thereof gave the two promissory notes upon which he was sued. The defendant Dee also purchased Akron sewer pipe at an agreed price as shown by the account upon which he was sued. Each defendant disputed his liability to the plaintiff upon the ground that prior to the making of the contracts with the defendants respectively for pipe, the plaintiff corporation entered into a combination with certain firms, corporations and companies engaged in Ohio in the manufacture of Akron pipe; which combination, it is alleged, was in illegal restraint of trade and therefore forbidden by the principles of the common law as recognized and enforced both in Ohio and Illinois.

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The defence cannot be maintained. Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies or either of them. It could pass a title by a sale to any one desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe.

In *Strait v. National Harrow Co.*, 51 Fed. Rep. 819, a suit in which the plaintiffs sought a permanent injunction restraining the defendant from instituting or prosecuting any action against the plaintiffs for the infringement of letters patent owned by the defendant covering certain improvements in spring-tooth har- [546] rows, or from instituting or prosecuting any such suits against any person using the spring-tooth harrows manufactured by the plaintiffs, the court said: "In substance, the complaint shows that the defendant has entered into a combination with various other manufacturers of spring-tooth harrows for the purpose of acquiring a monopoly in this country in the manufacture and sale of the same, and, as an incident thereto, has acquired all the rights of the other manufacturers for the exclusive sale and manufacture of such harrows under patents, or interests in patents, owned by them respectively. Such a combination may be an odious and a wicked one, but the proposition that the plaintiffs, while infringing the rights vested in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely unwarranted. The party having such a patent has a right to bring suit on it, not only against a manufacturer who infringes, but against dealers and users of the patented article, if he believes the patent is being infringed; and the motive

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which prompts him to sue is not open to judicial inquiry, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his legal rights. 'The exercise of the legal right cannot be affected by the motive which controls it.' *Kiff v. Youmans*, 86 N. Y. 329."

In *National Distilling Co. v. Cream City Importing Co.*, 86 Wisconsin, 352, 355, which was an action to recover the price of goods sold and delivered, one of the defences was that the plaintiff was a member of an illegal trust or combination to interfere with the freedom of trade and commerce. The Supreme Court of Wisconsin said: "The first defence does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void as against public policy, because the vendor was at the time a member of an unlawful trust or combination, formed to unlawfully interfere with the freedom of trade and com- [547] merce and in restraint thereof and to accomplish the ends therein set forth. . . . Conceding, for the purposes of this case, that the trust or combination in question may be illegal and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff and defendant was tainted with any illegality, or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called 'trust,' or 'combination,' the defendant might voluntarily purchase the goods in question of it at any agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon, or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combina-

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tion, created with the intent and purposes set forth in the answer, will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences."

That case was cited with approval by the Circuit Court of Appeals for the Seventh Circuit in *Dennehy v. McNulta*, 86 Fed. Rep. 825, 827, 829. In that case the court said: "The mere fact that the corporation, as one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal—a status apparently held in *Distilling & Cattle Feeding Co. v. People*, 156 Illinois, 448—cannot serve, *ipso facto*, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any [548] manner its independent contract obligations." Again: "In the case of an injurious combination of the nature asserted here, the remedy is by well recognized and direct proceedings; but one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination is illegal, or that its prices were unreasonable."

It is undoubtedly the general rule that a contract made in violation of a statute is void, and no recovery can be had upon it; as in *Embrey v. Jemison*, 131 U. S. 336, 348. That was an action upon a promissory note given in execution of a contract for the purchase of "future delivery" cotton, neither the purchase or delivery of actual cotton being contemplated by the parties, but the settlement in respect to which was to be on the basis of the "difference" between the contract price and the market price of cotton futures, according to the fluctuations in the market. The contract was held to be a wagering contract, and therefore illegal and void. As there could be no recovery upon the original agreement without disclosing the fact that it was illegal and one that could not, for that reason, be enforced or made the basis of a judgment, it was held, that attention could not be withdrawn from the ille-

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gality of the contract by the device of taking notes for the amount claimed under that contract. So, in *Miller v. Ammon*, 145 U. S. 421, 427. That was an action to recover the value of 1125 gallons of wines sold in Chicago by one who had not obtained a license to sell liquors at all—an ordinance of that city expressly declaring that no person, firm, or corporation should sell or offer for sale “any spirituous or vinous liquors in quantities of one gallon or more at a time, within the city, without having first obtained a license therefor,” under a penalty of not less than \$50 or more than \$200 for each offence. It was held that the action could not be maintained, because “an act done in disobedience to the law creates no right of action which a court of justice will enforce.” In that case the sale from which it was attempted to imply the promise of the buyer to pay for what [549] he received, was itself expressly forbidden by law under a penalty. The action there was upon the sale, and there was a direct connection between it and the purchase of the wines. So, again, in *McMullen v. Hoffman*, 174 U. S. 639, 654, after an extended review of the cases, American and English, the court said: “The authorities from the earliest time to the present unanimously held that no court will lend its assistance in any way toward carrying out the terms of an illegal contract.”

In the present case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not for that reason forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms or companies, a different question would be presented.

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But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would in itself be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and other corporations, firms or associations whereby an illegal combination was formed for the sale of sewer pipe.

We are of opinion that the first special defence, based alone upon the principles of the common law, was properly overruled.

3. The special defence based upon the act of Congress of July 2, 1890, c. 647, 26 Stat. 209, was also properly rejected.

[550] That act declares illegal "every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations"—every person making any such contract or engaging in any such conspiracy being subject to a fine not exceeding \$5000, or to imprisonment not exceeding one year, or to both punishments in the discretion of the court. § 1. So, every person monopolizing or attempting to monopolize, or combining or conspiring with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations, is liable by that act to the like penalties in the discretion of the court. § 2. The several Circuit Courts of the United States are invested with jurisdiction to prevent and restrain violations of its provisions. § 4. Any property owned under any contract or by any combination or pursuant to any conspiracy (and being the subject thereof), and being in the course of transportation from one State to another, or to a foreign country, is subject to be forfeited, seized and condemned. § 6. By another section it is declared: "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the

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damages by him sustained, and the cost of suit, including a reasonable attorney's fee." § 7.

Much of what has just been said in reference to the first special defence, based on the common law, is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the [551] time in the course of transportation from one State to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid.

In the case of *The Charles E. Wisewall*, 74 Fed. Rep. 802, which was a libel *in rem* by certain tug owners against a steam dredge to recover the value of certain services rendered by the tug in towing the dredges, it was sought to avoid payment for the services thus rendered upon the ground that the tug owners were members of an association which was illegal and void under the Sherman act. The court, assuming that the agreement by which the tugs acted in unison was prohibited by that act, said: "He [the claimant] should not be per-

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mitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services and having accepted the benefit thereof, he should pay. . . . An agreement by the tug *Mayflower* to tow the dredge *Wisewall*, for a reasonable sum, from Albany to Troy, is not void because the *Mayflower* is associated with other tugs to regulate the price of towing at Albany. Should the claimant purchase a pair of trousers at an Albany clothing shop, he would find it difficult to avoid paying their actual market price because the vendor and other tailors of that city had combined to keep up prices."

Nor can the defendants refuse to pay for what they bought upon the ground that the seventh section of the Sherman act [552] gives the right to any person "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by the act, to sue and recover treble the damages sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that "unliquidated damages arising out of covenants, contracts or torts disconnected with plaintiff's claim cannot be set off under the statute." *Robinson v. Hibbs*, 48 Ill. 408, 409, 410; *Hawks v. Lands*, 3 Gilm. 227, 232; *Hubbard v. Rogers*, 64 Ill. 434, 437; *Evans v. Hughey*, 76 Ill. 115. 120; *Clause v. Bullock Printing Press Co.*, 118 Ill. 612, 617; *Dushane v. Benedict*, 120 U. S. 630, 648. If the act of Congress expressly authorized one who purchased property from a combination organized in violation of its provisions to plead, in defence of a suit for the price, the illegal character of the combination, that would present an entirely different question. But the act contains no such provision.

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4. We come now to the consideration of the defence based upon the Trust statute of Illinois of 1893.

As that statute is alleged to be repugnant to the Constitution of the United States, and that its full scope may be seen, it is here given in full:

“§ 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or of two or more of them for either, any or all of the following purposes: First—to create or carry out restrictions in trade. Second—to limit or reduce the production, or increase or reduce the price of merchandise or commodities. Third—to prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities. [553] Fourth—to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established upon any article or commodity of merchandise, produce or manufacture intended for sale, use or consumption in this State; or to establish any pretended agency whereby the sale of any such article or commodity shall be covered up and made to appear to be for the original vendor, for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such article or commodity after the title to such article or commodity shall have passed from such vendor or manufacturer. Fifth—to make or enter into, or examine or carry out any contract, obligation or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of or transport any article or commodity, or article of trade, use, merchandise, commerce or consumption below a common standard figure, or card or list price, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine or unite any interest they may have in connection with

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the sale or transportation of any such article or commodity that its price might in any manner be affected.

“§ 2. That any corporation holding a charter under the laws of this State which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

“§ 3. For a violation of any of the provisions of this act by any corporation mentioned herein it shall be the duty of the Attorney General or prosecuting attorney, upon his own motion, to institute suit or *quo warranto* proceedings, at any county in this State in which such corporation exists, does business or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

[554] “§ 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proper proceedings, in any county in which such foreign corporation does business, in the name of the State on his relation.

“§ 5. Any violation of either or all of the provisions of section 1 of this act shall be and is hereby declared to be a conspiracy against trade, and a misdemeanor; and any person who may be or may become engaged in any such conspiracy or take part therein or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, orders thereunder, or in pursuance thereof, shall be punished by fine not less than two thousand dollars nor more than five thousand dollars.

“§ 6. In any indictment or information for any offence named in this act, it is sufficient to state the purposes and effects of the trust or combination, and that the accused was a member of, acted with or in pursuance of it, without giving its name or description or how or where it was created.

“§ 7. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in con-

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nection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

"§ 8. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

"§ 9. The provisions of this act *shall not apply to agricultural products or live stock while in the hands of the producer or raiser.*

"§ 10. Any purchaser of any article or commodity, from any person, firm, corporation or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act, shall not be liable for the [555] price or payment of such article or commodity and may plead this act as a defence to any suit for such price or payment." Laws, Ill. 1893, p. 182, act of June 20, 1893; Hurd's Rev. Stat. Ill. (1899), p. 618, title "Criminal Code."

Some reference was made to the act of the legislature of Illinois approved June 10, 1897, amending an act approved June 11, 1891, in force July 1, 1891, relating to the punishment of persons, partnerships or corporations forming pools, trusts and combines, and prescribing the mode of procedure and rules of evidence in such cases. The act of 1897 amended section one of the act of 1891 so as to read: "If any corporation organized under the laws of this or any other State or country for transacting or conducting any kind of business in this State, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of, or party to any pool, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, such corporation, partnership or individual or other association of

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persons shall be deemed and adjudicated guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act: provided, however, that in the mining, manufacture or production of articles of merchandise, the cost of which is mainly made up of wages, it shall not be unlawful for persons, firms or corporations doing business in this State to enter into joint arrangements of any sort, the principal object or effect of which is to maintain or increase wages." As this act of 1897 was passed after the date of the transactions here involved, it has nothing to do with the present case. Besides, the special defence was based on the act of 1893. The act of 1897 is referred to only as showing the exemption of another class from the operation of the general law relating to pools, trusts, combinations and confederations organ- [556] ized to regulate prices of articles, commodities and merchandise. Laws, Ill. 1897, c. 38, p. 153; Hurd's Revised Statutes of Illinois, pp. 615, 639.

That the arrangement or combination made between the Union Sewer Pipe Company and other companies, corporations and firms, created such a trust as the Illinois statute forbids is manifest from the evidence in the record. It is equally clear that if the plaintiff was an Illinois corporation, its charter could be forfeited and an end put to its corporate existence by proceedings instituted by the Attorney General of the State. §§ 1, 2 and 3. It is also clear that, if the statute is not altogether invalid the defendants could plead non-liability for the pipe purchased by them upon the ground that the plaintiff was, under the statute of Illinois, an illegal combination and the contracts which it made with the defendants were void. §§ 8, 10. The statute expressly authorizes such a defence. In that particular, the defence based upon the statute of Illinois differs from the other special defences.

The vital question, however, is whether the statute of Illinois of 1893 is not inconsistent with the Constitution of the United States, by reason of the fact that by the ninth section it declares that "the provisions of this act shall not apply to agricultural products or live stock while in the hands of producer or raiser." The Circuit Court held this section to be repugnant to the Fourteenth Amendment of the

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Constitution of the United States, and to be so connected and interwoven with other sections that its invalidity affected the entire act.

Looking specially at its provisions, it will be seen that, so far as the statute is concerned, two or more agriculturalists or two or more live stock raisers may, in respect of their products or live stock in hand, combine their capital, skill or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock; or limiting, increasing or reducing their price; or preventing competition in their sale or purchase; or fixing a standard or figure whereby the price thereof to the public may be controlled; or making contracts whereby they would become bound not to sell or dispose of such agricultural products or live stock below a common standard figure [557] or card or list price; or establishing the price of such products or stock in hand, so as to preclude free and unrestricted competition among themselves or others; or by agreeing to pool, combine or unite any interest they may have in connection with the sale or transportation of their products or live stock that the price might be affected. All this, so far as the statute is concerned, may be done by agriculturalists or live stock raisers in Illinois without subjecting them to the fine imposed by the statute. But exactly the same things, if done by two or more persons, firms, corporations or associations of persons, who shall have combined their capital, skill or acts, in respect of their property, merchandise or commodities held for sale or exchange, is made by the statute a public offence, and every principal, manager, director, agent, servant or employé knowingly carrying out the purposes, stipulations and orders of such combination is punishable by a fine of not less than two thousand nor more than five thousand dollars. Is not this such discrimination against those engaged in business (other than the sale of agricultural products and live stock in the hands of producers and raisers) as is forbidden by that clause of the Fourteenth Amendment which declares that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws?"

By section 26 of a statute of Illinois it is provided: "Foreign corporations, and the officers and agents thereof, doing

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business in this State shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon associations of like character organized under the general laws of this State, and shall have no other or greater powers." 1 Starr & Curtis, 619. The contracts upon which these suits are based were made in Illinois. The purpose of the above statute was "to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character and bring them all under the influence of the same law." *Stevens v. Pratt*, 101 Ill. 206; *Farmers' Loan and Trust Co. v. Lake St. Elevated R. R. Co.*, 173 Ill. 439. These matters are called to our attention as showing—as undoubtedly they do—that the Union Sewer Pipe Company, while doing business in Illinois, was subject to [558] the statute of Illinois concerning trusts or combinations, and which, in terms, applies to both domestic and foreign corporations. But the question remains to be decided whether the statute is repugnant to the Constitution of the United States. If it be, then it is not law and cannot be applied for the purpose of defeating the plaintiff's claims in these actions.

The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court, were not included in the grants of power to the General Government, and therefore were reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law." The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public

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safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons v. Ogden*, 9 Wheat. 1, 210; *Sinnot v. Davenport*, 22 How. 227, 243; *Missouri, Kansas & Texas Railway v. Haber*, 169 U. S. 613, 626.

What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the States will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general ques- [559] tion we have said that the guarantee of the equal protection of the laws means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances." *Missouri v. Lewis*, 101 U. S. 22, 31. We have also said: "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences." *Barbier v. Connolly*, 113 U. S. 27,

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31. This language was cited with approval in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, in which it was also said that "the equal protection of the laws is a pledge of the protection of equal laws." In *Hayes v. Missouri*, 120 U. S. 68, 71, we said that the Fourteenth Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, "shall be treated alike, under like circumstances and considerations, both in the privileges conferred, and in the limitations imposed." "Due process of law and the equal protection of the laws," this court has said, "are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the [560] powers of government." *Duncan v. Missouri*, 152 U. S. 377, 382. Many other cases in this court are to the like effect.

These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturalists and raisers of live stock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.

The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this court has held that classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

* * * But arbitrary selection can never be justified

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by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere ar- [561] bitrary selection.” *Gulf, Colorado and Santa Fé Railway v. Ellis*, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws.

Attention has been called to the cases of *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283, and *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89; and it is supposed that the grounds upon which the decision of the present case is placed are inconsistent with the principles announced in those cases. We do not think so.

In *Magoun v. Illinois Trust and Savings Bank* we held that the progressive inheritance tax law of Illinois of June 15, 1895, was not in conflict with the Constitution of the United States by reason of the fact that the amount of the tax was determinable by valuation so that every person and corporation should pay in proportion to the value of his, her or its property inherited. The classification made by the statute was held not to be arbitrary by reason of the fact that inheritances were classified according to amount, and each class taxed at a different rate; for it was based upon principles of equality between the members of each distinct class. Such classification was held not to be inconsistent with the Fourteenth Amendment.

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In *American Sugar Refining Co. v. Louisiana*, we held that a statute of Louisiana exempting from its operation planters and farmers grinding and refining their own sugar and molasses, but which imposed a license tax upon persons and corporations carrying on the business of refining sugar and molasses, did not deny the equal protection of the laws to such persons and corporations as were thus taxed. It was as if the statute had imposed a tax upon the *business* of refining sugar and molasses, and had declared, as reasonably it might have done, that those who only refined their own sugar and molasses should not be regarded as belonging to that class. We said in that case: [562] "The power of taxation under this provision was fully considered in *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232, in which it was said not to have been intended to prevent a State from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only and not securities; may allow or not allow deductions for indebtedness. 'All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the State in framing their constitution.'" Again: "The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

The decision now rendered is not all in conflict with the views expressed in the two cases just cited. It is sufficient to say that those cases had reference to the taxing power of the State, and involved considerations that could not, in the nature of things, apply to a state enactment like the one involved in the present case. The power to tax persons and property is an incident of sovereignty, and the extent to which it may be exerted has been indicated in numerous cases. Taxing laws, it has been well said, furnish the measure of every man's duty in support of the public burdens

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and the means of enforcing it. A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property of all callings. Its discretion in such matters is very great and should be exercised solely with reference to the general welfare as involved in the necessity of taxation for the support of the State. A State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the [563] United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the State, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates.

We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise under the taxing statutes of a State. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are

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given or secured by the supreme law of the land. We only need to say in this connection that the constitutional validity of the statute of Illinois now before us is not necessarily to be determined by the same principles that apply to taxing laws.

Other cases have been cited, but they are equally inapplicable in the present discussion, and only serve to show the extent to which the police powers of the States may be exerted without infringing the Federal Constitution.

Returning to the particular case before us, and repeating or summarizing some thoughts already expressed, it may be observed that if combinations of capital, skill or acts, in respect [564] of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill or acts for the purpose of establishing, controlling, increasing or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturalists and live stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the ninth section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that State.

We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regu-

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lations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary.

We therefore hold that the act of 1893 is repugnant to the Constitution of the United States, unless its ninth section can be eliminated, leaving the rest of the act in operation.

[565] The principles applicable to such a question are well settled by the adjudications of this court. The different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms *all* persons, firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal

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protection of the laws to those within its jurisdiction who are not embraced by the ninth section.

Whether it is also within the prohibition against the deprivation of property without due process of law, is a question which it is unnecessary to consider at this time.

Perceiving no error in the record, the judgment in each case must be affirmed.

Affirmed and it is so ordered.

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The trust statute of Illinois of 1893 is directed against combinations in trade made to affect prices of commodities. The court holds that the statute is repugnant to the Constitution of the United States because of the ninth section, which excludes from the operation of the statute "agricultural products or live stock while in the hands of the producer or raiser." In other words, and to present the discriminations of the statute in its application to persons, it punishes as a criminal conspiracy the acts enumerated in section one, except when they are done by producers and raisers of agricultural products and live stock in respect thereto. The statute also takes away a right of action for the price of the commodities sold. One of the defences of the plaintiffs in error was based on that provision.

The view of the court is that the legislation is purely discriminative and is not justified by any legal principle of classification. To sustain the view the rule expressed in *Gulf, Colorado & Santa Fé Railway v. Ellis*, 165 U. S. 150, is quoted. It was there said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." Undoubtedly. Without the observance of that principle, there can be no classification at all in any proper sense. There will be arbitrary grouping—

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not association of persons or things on account of common properties or characters or relations. But differences are recognized in classification as well as resemblances, and this court has found it necessary to so state. In *Atchison, Topeka & Santa Fé Railroad v. Matthews*, 174 U. S. 96, we said: "Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

It seems like a contradiction to say that a law having inequality of operation may yet give equality of protection. Viewed rightly, however, the contradiction disappears; indeed, need not even be expressed. There are very few exertions of [567] government which can be made applicable to all persons as such. Government is not a simple thing. It encounters and must deal with the problems which come from persons in an infinite variety of relations. Classification is the recognition of those relations, and in making it a legislature must be allowed a wide latitude of discretion and judgment. This has been decided many times against contentions based on a variety of facts. I will content myself by citing the later cases and commenting upon them very briefly. The cases are *Magoun v. Illinois Trust &c. Bank*, 170 U. S. 283; *Clark v. Kansas City*, 176 U. S. 114; *Gundling v. Chicago*, 177 U. S. 183; *Petit v. Minnesota*, 177 U. S. 164; *Williams v. Fears*, 179 U. S. 270; *American Sugar Refining Company v. Louisiana*, 179 U. S. 89.

In these cases and the cases cited in them classifications were sustained which depended upon differences in the amounts of legacies; on differences between corporations; on differences between land dependent on its use for agriculture and other purposes in regard to the power of a city to annex it; on differences between fire insurance and other insurance; on the right of a legislature to declare as a matter of law that the work of a barber was not a work of necessity, while as to all other kinds of labor the fact was to be determined by a jury; on the difference between hiring persons to labor in the State and hiring persons to labor out of the State; on differences between sugar refiners based entirely and only on the fact of the production or purchase of the sugar refined.

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In *American Sugar Refining Co. v. Louisiana*, a license tax was imposed on those engaged in carrying on the business of refining sugar and molasses. It was provided, however, that the law should not apply to "planters and farmers grinding and refining their own sugar."

Wherein did the Louisiana statute, which was held constitutional, differ from the Illinois statute, which is held to be unconstitutional? In the former case the distinction (in the opinion in the case it is called "discrimination") was between manufacturers of sugar and growers of it. In the case at bar the distinction is between traders in products and growers of them. Is not a parallel obvious? Can the cases be distinguished because [568] in one a tax was imposed and in the other conduct is regulated or penalized? Indeed, is not the distinction verbal, each being means to an end? Besides, what justification for the distinction is there under the Constitution? None, I submit, can be found in the words of that instrument. Any state legislation which denies the equal protection of the laws is prohibited. The prohibition is independent of form or means. It would be strange, indeed, if the power of a State is limited and confined by the Constitution of the United States, when the State attempts by law to regulate conduct, and is unbounded in its discretion when it imposes taxes; that in one case it may see a difference between manufacturers and planters, and in the other case may not see a difference between traders in commodities acquired for the purposes of sale and such property when held by farmers by whose labor they were produced.

The reasoning of the cases is as strong and demonstrative as their instances. We have declared that we could not investigate or condemn the impolicy of a state law, and that this court is not a refuge from the mere injustice and oppression of state legislation. Many of the exercises of government, it has been pointed out, were addressed to persons, not absolutely or abstractly, but according to their relations, and that classification, based on those relations, need not be constituted by an exact or scientific exclusion or inclusion of persons or things. Therefore, it has been repeatedly declared that classification is justified, if it is not palpably arbitrary.

The cases afford not only affirmative examples but also by

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a negative deduction illustrate what is legal classification. Mr. Justice Bradley said in *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232: "Clear and hostile demonstrations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition." That is, the prohibition upon the States to deny to any citizen the equal protection of the laws. The thought of Mr. Justice Bradley was developed and illustrated by Mr. Justice Brown, speaking for this court in *American Sugar Refining Co. v. Louisiana*, and tests of the unconstitutionality of the discriminations of a state law [569] were expressed, which were as ready as they were significant. Speaking of the Louisiana act, which discriminated between refiners of sugar, Mr. Justice Brown said: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely *arbitrary, oppressive or capricious* (the italics are mine), and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes."

Of course, the enumeration of some tests does not exclude others, but why the enumeration of the special kind? Did not the case require it? What ingenuity can find a difference in the act and process of sugar refining when done by a purchaser of raw sugar and a raiser (planter) of it; what difference in the product after it shall be refined, or in any element, thing or circumstance, which can affect its use or sale. The whole and only distinction in the classes which the statute made was between the grower of sugar and the buyer of it—the exact and only distinction of the Illinois law now held to be void, and yet the Louisiana law was sustained as constitutional.

I have already adverted to the distinction which may be claimed to exist between taxing laws and regulating laws, but a few words more may be justified. The opinion of the court

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makes a great deal of the penal provisions of the trust law, and its discriminations are displayed and intensified more by the recitation and effect of those provisions than by the provision upon which the defence of plaintiffs in error was based, that is, the provision (sec. 10) which precludes recovery of the price of "any article or commodity sold" by an offender against the statute.

The penal provisions of the statute are not before us for judgment. If they were, and the unconstitutionality of the statute could be attributed to them, they might be construed as separable and be discarded. But, not insisting on that, and consider- [570] ing the comments on those provisions to be more than incidental illustration of the character of the statute, it is very clear to me that they do not in any way affect the power of the State. In other words, the power of the State cannot be impugned or affected by the sanctions which the State may impose to secure obedience to its commands or prohibitions. It may be through a tax or it may be through penalties, and the question will always be, is the thing which is directed or forbidden within the power of the State? And when a statute is assailed as denying the equal protection of the laws its equal operation is only involved.

The principle of classification, therefore, is not different in tax laws than in other laws. That principle, as I have said, necessarily implies discrimination between the persons composing the class and other persons. The equality prescribed by the Constitution is fulfilled if equality be observed between the members of the class. It is violated if such equality be not observed, and the latter was the case in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79. That case, therefore, does not sustain the ruling now made.

Any further remarks may be only repetition, but the application of the cases to the statute now before us should be pointed out.

The equality of operation which the Constitution requires in state legislation cannot be construed, as we have seen, as demanding an absolute universality of operation, having no regard to the different capabilities, conditions and relations of men. Classification, therefore, is necessary, but what are

Mr. Justice McKenna, dissenting.

its limits? They are not easily defined, but the purview of the legislation should be regarded. A line must not be drawn which includes arbitrarily some persons who do and some persons who do not stand in the same relation to the purpose of the legislation. But a wide latitude of selection must be left to the legislature. It is only a palpable abuse of the power of selection which can be judicially reviewed, and the right of review is so delicate that even in its best exercises it may lead to challenge. At times, indeed, it must be exercised, but should always be exercised in view of the function and necessarily large powers of a legislature.

[571] What was the purpose of the Illinois statute, and what were the relations of its classes to that purpose? The statute was the expression of the purpose of the State to suppress combinations to control the prices of commodities, not, however, in the hands of the producers, but in the hands of traders, persons or corporations. Shall we say that such suppression must be universal or not at all? How can we? What knowledge have we of the condition in Illinois which invoked the legislation, or in what form and extent the evil of combinations to control prices appeared in that State? Indeed, whether such combinations are evils or blessings, or to what extent either, is not a judicial inquiry. If we can assume them to be evil because the statute does so, can we go beyond the statute and determine for ourselves the local conditions and condemn the legislation dependent thereon? But are there not, between the classes which the statute makes, distinctions which the legislature had a right to consider? Of whom are the classes composed? The excluded class is composed of farmers and stock raisers while holding the products or live stock produced or raised by them. The included class is composed of merchants, traders, manufacturers, all engaged in commercial transactions. That is, one class is composed of persons who are scattered on farms; the other class is composed of persons congregated in cities and towns, not only of natural persons but of corporate organizations. In the difference of these situations, and in other differences which will occur to any reflection, might not the legislature see difference in opportunities and powers between the classes in regard to the prohibited acts? That

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differences exist cannot be denied. To describe and contrast them might be invidious. To consider their effect would take us from legal problems to economic ones, and this demonstrates to my mind how essentially any judgment or action, based upon those differences, is legislative and cannot be reviewed by the judiciary.

I am, therefore, constrained to dissent from the judgment of the court.

MR. JUSTICE GRAY took no part in the decision of this case.

[610] CHESAPEAKE & O. FUEL CO. v. UNITED STATES.^a

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

[115 Fed., 610.]

MONOPOLIES—ANTI-TRUST ACT—CONTRACTS IN RESTRAINT OF INTERSTATE COMMERCE.—By the anti-trust act of July 2, 1890 (26 Stat. 209), congress has, in the exercise of the power delegated to it by the constitution, declared all contracts and combinations illegal, if in restraint of trade or commerce among the states; and such act does not leave to the courts the consideration of the question whether the restraint is or is not unreasonable, and such as would have rendered the contract invalid at common law. The only question in each case where the validity of a contract or combination under the law is involved is whether or not its necessary effect is to restrain interstate commerce.^b

SAME—CONTRACTS AFFECTING INTERSTATE COMMERCE.—A contract by which a corporation agrees to take the entire product of a number of independent persons, firms, and corporations engaged in mining coal and making coke in a certain district, which is intended for "Western shipment" over a leading route of transportation, to sell the same at not less than a minimum price, to be fixed by an executive committee appointed by the producers, and to account for and pay over to such producers the entire proceeds, above a fixed sum per ton to be retained as "compensation,"—the stated purpose being to "enlarge the Western market,"—and under which the shipments are made into other states, is one affecting interstate commerce, and is subject to the provisions of the anti-trust law.

^a Combination dissolved by the Circuit Court (105 Fed., 93). See p. 34.

^b Syllabus copyrighted, 1902, by West Publishing Co.

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[611] SAME—COMBINATIONS IN RESTRAINT OF TRADE.—By a contract between a fuel company and an association composed of 14 persons, firms, and corporations independently engaged in producing coal and coke in a certain district on a line of a railroad, the company was to handle for a term of years the entire output of the members of the association intended for the Western market, and shipped over such line of railroad, and bound itself not to sell the product of any competing mines. A minimum price at which the coal and coke should be sold was to be fixed by the executive committee of the association from time to time, and the company agreed to pay such price, to obtain as large a profit as possible, and to account to the association for all of the same, above a fixed sum per ton, which it was to retain as compensation. The amount to be furnished by each member of the association was also to be fixed by the executive committee, and each was to receive payment at the same rate, to be based on the average price realized for the particular grade furnished during the current month. It was also provided that any other producer of coal to be shipped on such line of railroad might become a party to the contract by a majority vote of the members of the association. *Held*, that such contract was illegal, under the anti-trust law, as in restraint of interstate commerce, and as tending to create a monopoly.

SAME—REQUISITES OF ILLEGAL COMBINATION—PREVENTING INDIVIDUAL COMPETITION.—It is the declared policy of congress, which accords with the principles of the common law, to promote individual competition in relation to interstate commerce, and to prevent combinations which restrain such competition between their members, or between such members as individuals and outside competitors; and it is no defense to a suit to dissolve such a combination as illegal, under the anti-trust law, that it has not been productive of injury to the public, or even that it has been beneficial, by enabling the combination to compete for business in a wider field.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This case arises from the filing of a bill in the circuit court by the district attorney of the United States for the Southern district of Ohio, by direction of the attorney general, against the defendants, to enjoin them from selling or shipping coal or coke into any state other than the one in which they reside, under or by virtue of a certain agreement set forth and attached to the bill. The complainants ask that the defendants be restrained from further conspiring, agreeing, combining, and acting together in the manner set out in the agreement, which it is prayed be declared null and void, and the unlawful trust and combination thereunder be dissolved by decree of court. The agreement which it is alleged evidences the combination is as follows:

"This agreement, made this 15th day of December, 1897, between the C. & O. Fuel Company, a corporation created, organized, and

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existing under and pursuant to the laws of the state of West Virginia, and hereinafter called the 'Fuel Company,' of the first part, and the St. Clair Company, a corporation of West Virginia; John Carver and Enoch Carver, partners in business under the firm name and style of Carver Brothers; W. R. Johnson, M. T. Davis, doing business as M. T. Davis & Co.; John Carver and Enoch Carver, partners in business under the firm name and style of the Mecca Coal and Coke Company; S. H. Montgomery, doing business under the name of the Montgomery Coal Company; the Chesapeake Mining Company, a corporation of West Virginia; the Belmont Coal Company, a corporation of West Virginia; the Kanawha Splint Coal Company, a corporation of West Virginia; the Robinson Coal Company, a corporation of West Virginia; Harry B. Smith, special receiver of the Lens Creek Coal and Coak Company; Joseph Renshaw, special receiver of the Big Black Band Coal [612] Company; the Charlmore Coal Company, a corporation of West Virginia; and Robert Brabbin, Jr., and L. N. Perry, partners in business under the firm name and style of the Brabbin Coal Company; Jasper McCallister, Samuel Moore, and James Kelsoe, doing business as McCallister & Co.,—and together constituting the C. & O. Coal Association, and hereinafter collectively mentioned as the 'Coal Association,' of the second part. Whereas, the members of the said coal association are all miners and shippers of coal, and part of them makers and shippers of coke, on the line of the Chesapeake & Ohio Railway, in Fayette or Kanawha counties, West Virginia, and have formed and organized said association for the promotion of their common business interests in the mining of Kanawha coals and cokes; and whereas, the said fuel company has been incorporated and organized for the purpose of placing said Kanawha coals and cokes upon the Western market,—its prime object to promote the sale of, and enlarge the Western market for, said coals and cokes: Now, therefore, this agreement witnesseth:

"(1) That the parties of the second part agree, in consideration of the covenants and agreements on the part of the party of the first part herein contained, each firm, individual, or corporation, severally, for themselves, himself, or itself, and not for any other, and each of them doth hereby agree to sell to the said fuel company exclusively the entire coal and coke output of the mine or mines operated by each of them, respectively, on said C. & O. Ry., or branches thereof, for Western shipment, for a period of not less than five years from and after the date of January, 1898, subject to all the provisions, terms, and conditions hereinafter contained, except as to such coal as may be sold by any member of said coal association to the Chesapeake & Ohio Railway Company for the consumption of said railway company, which said coal such member shall have the right to sell to said railway company direct; it being understood that this contract applies only to the coal and coke to be sold west of the respective mines of the members of said coal association, and shall not in any way apply to, or interfere with, the Eastern trade of the members of said association.

"(2) The minimum price f. o. b. mines of all the various grades of coal and coke sold and to be shipped West by the members of said association, and embraced in this contract, shall be fixed by the executive committee of said coal association from time to time, as it shall see proper, after consultation with the executive committee of the fuel company. The said fuel company covenants, agrees, and binds itself that it will make no contract for the sale of any coal or coke of any members of said association at a price lower than such minimum prices to be fixed by such committee, and further that it will at all times endeavor to obtain the maximum price for such coal

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and coke. It is understood and agreed that the minimum prices hereinbefore mentioned are net prices f. o. b. mines, and not including any profit to the said fuel company, which is to get its profit over and above said prices.

"(3) That the said fuel company shall make its sales direct, and shall not make any contract for the sale of coal and coke to a third party in the name of any member of the said coal association, and shall have no right by any contract to bind any member of said association to any third party, except for river business, as hereinafter provided for.

"(4) The executive committee of said fuel company, who shall administer and have charge of its affairs, shall be composed of three (3) persons, one of whom shall at all times be a member of, or officer of a member of, said coal association, and shall from time to time, according to the by-laws or articles of association of said association, be designated as a member of such executive committee, and shall thereupon be appointed such member of such executive committee by said fuel company in the place and stead of the member of, or officer of a member of, said coal association previously occupying such office. The executive committee of said coal association shall consist of three members of, or officers of members of, said coal association, to be selected as such from time to time by the members of said coal association according to their by-laws or articles of association.

[613] "(5) The said fuel company covenants, agrees, and binds itself to sell for shipment by rail via the said Chesapeake & Ohio Railway, and pay for, to the members of said coal association as hereinafter agreed, not less than 600,000 tons per annum of coal, and 75,000 tons per annum of coke; such sales and shipments to be disposed of in as nearly equal monthly quantities as possible. But in case said fuel company is unable for any time to make sales of coal or coke by reason of the failure or inability of the members of said association to make prices sufficiently low to enable said fuel company to meet the prices in the market where said coal or coke is sought to be sold, and to compete with other sellers of coal or coke in such markets, then there shall be an abatement of the minimum amount of coal or coke hereinbefore agreed to be taken annually by said fuel company, bearing the same proportion to such minimum amount of coal or coke as such time during which such inability to meet such market prices shall continue does to one year. The executive committee of said coal association shall, not later than the 20th day of each month, designate the percentage of the total product of each class and grade of coal and coke which they deem best to be shipped by each member of said association by rail as aforesaid during the succeeding month, which apportionment so made shall be furnished the general manager of said fuel company not later than the 20th day of said first-mentioned month, and all orders received to be shipped by rail as aforesaid during such succeeding month shall be distributed between the members of said coal association by said general manager according to such apportionments; provided that, if any member of said coal association shall be unable or shall not desire to ship West the full amount of any kind or grade of coal or coke apportioned to such member for any month, the said fuel company shall distribute the order for the deficiency so caused among the other members of said association who are shippers of such grade of coal or coke in the proportion as between such other members fixed by said committee for such month; provided, further, that only actual inability shall excuse a member of said association from shipping so much of the apportionment for any month as shall be required by the said fuel company for contribution to contracts previously taken by said fuel company.

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"(6) The said fuel company shall make and render to the members of the coal association accurate and complete reports of all coke and coal shipped by rail as aforesaid, as follows: (a) A daily report of all sales, showing the net prices of such sales. (b) A monthly report showing the tonnage of the various kinds of grades of coal and coke shipped by members of said coal association and weighed during the month, or weighed during such month though shipped during a preceding month, together with the average price for each grade or kind of coal or coke so shipped and weighed, which average price shall be computed upon the basis of the actual price, less gross profits, if any, received for all coal or coke sold, and the minimum price, fixed as hereinafter provided, for such month for coal or coke not sold in such month; said report to be made not later than the 10th day of each month for all coal and coke weighed, or weighed during the previous calendar month. The coal and coke shipped and weighed or weighed during such month shall be paid for by said fuel company to the members of said coal association according to the average prices, determined aforesaid, and upon the sale after the end of each month of any coal or coke shipped and weighed, or weighed but not sold during such month, the surplus, if any, arising after deducting from the actual price received the minimum price for such kind and grade of coal or coke for such month, and profit, shall be paid forthwith to the shippers of such grade of coal or coke for such month according to their tonnage of such kind or grade of coal or coke for such month. And the said fuel company agrees and binds itself to pay as aforesaid, in cash, on or before the 20th day of each month, for all coal and coke during the previous calendar month.

"(7) The said fuel company further covenants, agrees, and binds itself to handle only such coal and coke as are produced by the above-mentioned members of said coal association, and not to handle, buy, or sell, for itself or on commission, any coal or coke produced by any other operator [614] along said Chesapeake & Ohio Railway, or branches thereof, or any coal or coke, wherever produced, of the same grade as, or competing with, coal or coke produced by any of the members of said association, the prime object of this contract being to enlarge the sale of, and extend the Western market for, Kanawha coal and coke; and this shall not prevent the said fuel company from dealing in anthracite coal or New River coal or coke; provided, that New River coal or coke shall not be dealt in to the prejudice of, or sold as a substitute for, Kanawha coals and cokes; and, provided, further, that in an emergency, and when absolutely necessary, other coals and cokes may be handled by said fuel company to meet such emergency. But no dealing in such anthracite, New River, or other coal or coke shall be done by said fuel company to an extent or in a manner incompatible with the prime object of this agreement, as hereinbefore recited.

"(8) That at any time, by a vote of two-thirds ($\frac{2}{3}$) of the members of said coal association, said fuel company may be allowed to handle any other coal or coke for such time and upon such terms and conditions as may be prescribed by such vote.

"(9) The said fuel company is to receive a gross profit on all rail coal and coke sold, which shall not exceed ten (10) cents per ton of two (2,000) thousand pounds on any sale, which compensation shall be retained by said fuel company out of the monthly settlements of coal and coke sold; the true intent and meaning of this clause being that the fuel company shall get its profit over and above the net minimum price of said coal and coke f. o. b. mines as hereinbefore fixed, and, if the price at which said coal and coke is sold by said fuel company shall be sufficient to yield a sum exceeding said minimum price and gross profit of ten (10) cents per ton as aforesaid,

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then the difference shall be paid over to the members of said association in the manner and at the time hereinbefore mentioned, as they may be entitled under this agreement, as part of the purchase price to be paid for coal and coke by said fuel company.

"(10) The members of said association shall not be required to mine and ship coal when hindered or prevented by causes beyond their own control, such as strikes, accidents, refusal or inability of the carrier to provide transportation, &c.

"(11) The said coal association shall have the right, once per month, through a committee not exceeding three in number, or a person designated by said committee, to examine the order, sales, and tonnage books of said fuel company.

"(12) The coal or coke of members of said coal association shipped in barges by river shall be handled by the said fuel company, as an agent, on the same terms and under the same conditions as are now established or may be hereafter established and prevail in Cincinnati market for the sale of river coal, but the said fuel company shall not make time sales or extend credit without the consent of the shippers of such coal.

"(13) All settlements for coal or coke shipped by rail as aforesaid shall be made upon the scale of weights of the Chesapeake & Ohio Railway Company, as ascertained at its weighing stations now established, or that may hereafter be established.

"(14) It is distinctly understood that nothing herein contained shall be construed to render the said members of said association liable as partners, in any way, manner, or form, either as between themselves or with the said fuel company; each of said firms, corporations, and individuals contracting herein for themselves, itself, or himself, and not one for the other.

"(15) The said fuel company further covenants, agrees, and binds itself that neither it, nor any of its officers, employés, or servants, will, with its knowledge, directly or indirectly, in any way, manner, or form, engage or become interested in the buying or selling of bituminous coal or coke in competition with the coal or coke of any of the members of said coal association, except under the terms and conditions of this agreement.

"(16) The members of said coal association above named, each for himself, itself, or themselves, and not one for the other, covenant and agree [615] that the said members of said association will not sell or consign any coal or coke bound to points west of their respective mines, except under the terms and conditions of this agreement, during the period covered by this agreement, and that there shall be no pretended sale or lease of the property of the members of the said association made to evade this contract; but it is further understood and mutually agreed that this contract shall not be construed to prevent any bona fide sale, assignment, or lease of the respective properties operated by the members of said association, respectively, or the interest therein of any member of said association. And in case of such sale, assignment, or lease, the members of said association are not to be held responsible under this contract for the sale and delivery of any coal from such properties after such sale, assignment, or lease takes place. But in case the vendee, assignee, or lessee of any coal or coke property of any member of the coal association desires, he shall have the right to take the place of such member in this agreement.

"(17) And whereas, some of the members of said association have contracts for the sale of coal or coke, which cannot be completed until after this agreement goes into operation; and whereas, it is to the advantage both of such members and of said fuel company that such contracts be filled through said fuel company: It is further agreed that the members of said association having existing contracts to be completed during the period of this agreement

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shall on or before the 24th day of December, 1897, file with the general manager of said fuel company a memorandum of each of said contracts, and such of said contracts as are uncompleted on the first day of January, 1898, shall be completed through said fuel company; the fuel company to make no charge for its services in connection with such contract, and collecting the proceeds of the same; said fuel company not to guaranty the collection of such proceeds, or be responsible for same unless collected by it. Such coal or coke so shipped on existing contracts shall not be taken into account in any way as a part of the traffic hereinbefore provided for in this contract, nor its prices taken into account in computing the average price for any month, but such as shall be shipped by rail shall be considered part of the minimum tonnage mentioned in the fifth clause of this agreement for the year in which it is shipped.

"(18) The said fuel company shall keep at its own expense one or more inspectors to examine and inspect from time to time, as often as may be necessary, the coal and coke produced, with a view of keeping up a proper standard of excellence. Should said inspector find coal or coke badly or improperly prepared, he shall immediately report all the facts in writing to the fuel company and to the operator preparing such coal or coke, and shipments from mine or mines producing such alleged improperly prepared coal or coke may be suspended after five (5) days' notice in writing to such operator, at the discretion of the executive committee of the fuel company, until such time as such operator may prepare such coal or coke properly. In any case such operator shall have the right to refer the question whether such coal or coke is improperly prepared or not, or, if not so prepared, whether the same be so prepared at reasonable cost, to arbitration, as herein provided, which decision as to the preparation of such coal shall be final and binding on both parties; and in case said arbitration shall find such coal or coke improperly prepared, and shall further find that it is impossible or impracticable for such operator to remedy such faults at reasonable cost, he shall have the right to withdraw from, and have this agreement annulled as to him. If said fuel company shall make default in payment for any coal or coke shipped under this agreement according to the terms hereof, and said default shall continue for the space of fifteen (15) days, unless payment shall be withheld by reason of attachment, suggestion, garnishment, or other legal process against the member of said coal association on whose claim default is so made, such default shall, at the option of such member on whose claim such default is so made, work an annulment of this contract as to such member: provided, such member shall within ten (10) days after the expiration of said fifteen (15) days give notice in writing to said fuel company of the election of such member to exercise such right of annulment; and a failure to exercise this right [616] for any such default shall not prevent the exercise of the same for any subsequent default. And a violation or failure to keep, observe, and perform any covenant or covenants herein contained by any party to this agreement shall, at the option of the party or parties thereby aggrieved, work an annulment of this agreement as to such party or parties on thirty (30) days' notice in writing. And no waiver of this right, in case of any violation or failure to keep, observe, and perform any covenant hereof, shall prevent the exercise of the same for any subsequent violation of, or failure to keep, observe, and perform, the same, or any other covenant hereof: provided that, upon any notice for the annulment of this agreement as hereinbefore provided being given by any parties or party, the party or parties to whom it is so given, if desiring to contest the rights of the parties or party giving said notice to annul this agreement, shall have the

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right to submit the question to arbitration, as herein provided, and the decision of such arbitrator shall be final and binding on all parties to such arbitration. But any withdrawal or annulment as to any member or members under this, or clause No. 18 hereof, shall not affect this contract as to the parties remaining, between themselves.

"(19) Any person, firm, or corporation now or hereafter producing coal to be shipped on the Chesapeake & Ohio Railway may become a party to this contract by signing the same, or an exact copy hereof, with the fuel company, or by an indorsement attached hereto may accept the provisions hereof; and, upon becoming such party hereto, such person, firm, or corporation shall be entitled to all the rights and privileges, and be subject to all the duties and liabilities, hereunder, the same as if he, it, or they had been named in said contract as one of the parties of the second part, and had duly signed and executed it with the others named therein: provided, that said association shall agree to such person, firm, or corporation becoming a party hereto by a majority vote of a quorum of its members.

"(20) It is understood and hereby agreed that in any matter or thing connected with this agreement, where any party hereto shall assert, maintain, or set up any claim, right, privilege, liability, or penalty in his, its, or their favor, or against any other party or parties hereto, and thereby a controversy shall arise hereunder, then and in that event either party or parties to such controversy shall have the right to submit the said controversy to arbitration in the manner hereinafter set forth. There is hereby constituted and appointed an arbitration committee, which shall be composed of two persons and such third person as shall be by such two selected from time to time as any controversy may arise. Such two persons shall be selected as follows: Each and every year during the continuance of this contract the said fuel company shall appoint some person to serve upon said arbitration committee, and the parties of the second part shall also appoint one to serve upon said committee, of which appointment the fuel company and the association shall have notice, and the two persons so appointed shall continue to serve until their successors shall be appointed in the same manner. Whenever a controversy shall arise hereunder, the party desiring to submit such controversy shall notify the other party or parties to such controversy of the same, in writing, and shall designate in such notice the time and place when said two arbitrators shall meet to hear the matter in controversy, and he or they shall also notify the said arbitrators to meet at said time and place. And at the time and place so designated said two arbitrators shall meet, and they shall select a third arbitrator, who, with the other two, shall constitute the full arbitration committee to hear and determine the said controversy, and whose award in all matters of law and fact shall be final, and shall be binding upon each and all of the parties to that controversy. Such notice may be served as a legal notice is served, or it may be mailed to the party, to be served at his or their post-office address. And any notice to any one or more of the parties of the second part may be served upon, or sent by mail to, the president and secretary of said association. If at the time and place said two arbitrators are required to meet, either one or both of them should fail or refuse to attend or serve, then the fuel company, by its agent or attorney, on the one side, may fill the vacancy caused by its arbitrator being absent or [617] refusing to serve, and the association, by its officer, agent, or attorney, may fill the vacancy caused by the absence of its arbitrator, or his refusing to serve; and the arbitrator or arbitrators so selected by either or both of said parties as aforesaid shall select the third, which three shall, for that controversy, constitute the arbitration committee, and shall have the same powers, and their award shall be as final, as if the two

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arbitrators herein first provided for had attended and selected a third. If, upon having notice to attend at a time and place to settle a controversy, either party shall fail or refuse to attend, or shall fail or refuse to select an arbitrator when required hereunder so to do, the said association, by its president, other officer, or attorney, may select an arbitrator in the place or stead of the absent one; and, if such association shall fail or refuse to make such appointment, in that event the fuel company, by its agent or attorney, may make such appointment or appointments, and the two, when so appointed in any of said modes, shall select a third, and the three shall constitute the arbitration committee to hear and determine said controversy, whose award shall be final. A notice to arbitrate hereunder shall not fix a time longer than fifteen (15) days, nor less than five (5) days, from the time of giving said notice, unless by mutual consent. The place of such meeting of the arbitrators shall be at Cincinnati, Ohio, or Charleston, W. Va., unless by mutual consent. Said arbitrators shall have the right to adjourn their session from time to time, or to such place or places as they may determine. And they shall make their award in not less than three days from the time the evidence is finally taken before or submitted to them; such award to be valid if signed by two of the arbitrators. Every award shall be executed in duplicate, and a copy thereof furnished to each of the executive committees herein mentioned. The failure of a regular arbitrator to attend at a time and place designated in any notice to him, and the appointment of another in his stead for any controversy, shall not for that reason vacate his general appointment as an arbitrator until his successor is appointed. If the two arbitrators appointed as above provided shall at any time fail or refuse for two days to appoint the third arbitrator, the latter shall be appointed by the judge of the circuit court of Kanawha county, West Virginia.

"Witness the following signatures:

"THE C. & O. FUEL CO.,
 "DONALD McDONALD, *Pt.*
 "ROBINSON COAL CO.,
 "By NEIL ROBINSON.
 "W. R. JOHNSON.
 "THE KANAWHA SPLINT COAL COMPANY,
 "By F. E. LAIR.
 "CARVER BROS.
 "ENOCH CARVER.
 "JOS RENSHAW,
"Special Receiver Big Black Band Coal Co.
 "CHARLMORE COAL CO.,
 "HERNDON & RENSHAW, *Mgrs.*
 "McCALLISTER & CO.,
 "Per JAMES KELSOE.
 "MECCA COAL & COKE CO.,
 "By JOHN CARVER.
 "CHESAPEAKE MINING CO.,
 "By J. B. LEWIS.
 "COALBURG COLLIERY CO.,
 "By J. B. LEWIS.
 "MONTGOMERY COAL CO.,
 "By S. H. MONTGOMERY.
 "BELMONT COAL CO.,
 "By T. E. EMBLETON, *Pt.*
 "HARRIS B. SMITH,
"Spl. Receiver Lens Creek Coal & Coke Co."

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[618] The defendants answered, admitting the making of the contract, and taking issue upon the other allegations of the bill, and seeking to justify the making of the agreement for lawful purposes, for reasons set forth in the answer, which are noticed in the opinion. The complainant offered no testimony, but certain evidence was introduced by the defendants for the purpose of showing the legality of the transaction, and did tend to establish certain facts,—among others, the following: The 14 parties to the agreement are carrying on trade and business in what is known as the "Kanawha district," in West Virginia. These parties are miners and shippers of coal and manufacturers of coke in that district, and the mines covered by the contract are on the south side of the Kanawha river. They do not own all of the mines on that side of the river. One Donald McDonald had been the agent of the various coal companies in the sale of coal and coke at Cincinnati, Ohio, prior to the formation of the Chesapeake & Ohio Fuel Company, which company is one of the parties to the agreement in controversy, and of which he became the president. His business, before the formation of the fuel company, was largely confined to local points west of the Chesapeake & Ohio Railroad, and to Cincinnati and vicinity. After the making of the contract, coal and coke were sold thereunder in West Virginia, Kentucky, Ohio, Indiana, Illinois, Michigan, Wisconsin, Missouri, Iowa, Nebraska, North Dakota, South Dakota, Arizona, and small quantities in Mississippi. Of the parties to the agreement, which relates only to rail shipments west on the Chesapeake & Ohio Railroad, seven in number have river tipples for shipping coal by the Great Kanawha river. Other miners, not parties to this agreement, also have tipples for shipping coal on this river. The mines embraced in the agreement have a capacity of about 5,000 tons a day, and the mines of the Kanawha district not parties to the agreement have a capacity of about 11,000 tons a day. The coke ovens in this district represented by parties in this agreement are about 226 in number, with a daily capacity of about 450 tons, to about 347 in number, with a daily capacity of 525 tons owned by others than the parties to the agreement. Competition in the Western market is keen with the coal mines shipped along the line of the Chesapeake & Ohio Railroad, in the Kanawha district. This competition comes from the Flat Top coal fields on the line of the Norfolk & Western Railroad, from the coal fields all along the line of the Baltimore & Ohio Railroad, West Virginia & Pittsburgh Railroad, and West Virginia Central Railroad; also competition by rail and water from all of the great coal fields of western Pennsylvania, the Hocking, Welston, and Nelson fields of Ohio, the coal fields of Kentucky and Tennessee, northern and southern Illinois, and the fields of Iowa, and some competition from Missouri. The aggregate of all these fields is about 115,000,000 tons annually. The competition in the Western market is severe, with the coke produced in the Kanawha district. The twelfth clause of the agreement, which provides that the Chesapeake & Ohio Fuel Company shall handle the coal shipped in barges, was rescinded by all the parties to the agreement in June, 1898. The business of the operators had not been satisfactory, and it was agreed with McDonald, the former sales agent, that a company should be formed for the sale of the coal, which should use every practicable means to push the sale of the coal, and to enlarge its market. There were large contracts, which no single operator could take. The minimum of 600,000 tons of coal and 75,000 tons of coke per annum, which it is provided shall be taken under the contract, was considerably in excess of the previous year's shipments. In making the contract, the coal was placed at about 60,000 tons in excess of the previous year's production, and the coke at 30,000 tons. It is testified that larger contracts had been obtained for the sale of coal than theretofore, and larger than any of

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the operators could fill. And better preparation of the coal for the market had been secured, together with a more equitable distribution of the cars for the shipment of the coal. Since the fall of 1898 an agent, termed the "equalizer," has been employed to attend to the distribution of the orders sent in by the fuel company. The price to consumers has been reduced, and there has been no intention to control the market or enhance prices. The circuit court made a decree in favor of the complainant (105 Fed. 93), and the defendants appealed.

[619] *Malcolm Johnson* and *A. C. Cassatt*, for appellants.

Wm. E. Bundy and *Sherman T. McPherson*, for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge (after stating the facts as above).

This action involves the construction and application of Act Cong. July 2, 1890 (26 Stat. 209). This statute makes illegal "every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations." The act further makes it a misdemeanor to monopolize or attempt to monopolize, or combine or conspire with others to monopolize, any part of the trade or commerce among the several states. This suit was brought under cover of the fourth section, giving to the circuit court jurisdiction of proceedings in equity brought by the United States district attorney, under the direction of the attorney general, to restrain violations of the law.

Is the contract in restraint of trade, within the meaning of the law? As we understand the decisions of the supreme court of the United States, the construction of the statute is no longer an open question. At the common law, contracts were invalid when in unreasonable restraint of trade, and were not enforced by the courts. See opinion of this court, per Taft, Circuit Judge, in *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271-279, 46 L. R. A. 122. By the constitution of the United States, congress is given plenary power to regulate commerce between the states and with foreign nations. In the exercise of this power, congress may prevent interference by the states with the free-

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dom of interstate commerce, and may likewise prohibit individuals, by contract or otherwise, from impeding the free and untrammelled flow of such trade. In the exercise of this right, congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but all contracts and combinations are declared illegal if in restraint of trade or commerce among the states. *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

While this is the general rule to be deduced from the authorities cited, it is to be remembered that the supreme court has also declared:

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect commerce." *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259.

The question is, in each case, does the contract or combination have the necessary effect to restrain interstate commerce? A contract or combination which interferes with the freedom of interstate commerce, [620] and hinders or prevents its free enjoyment, to the extent that it does so, restrains that commerce, and is illegal. It was the policy of the common law to discourage monopolies, and to refuse to enforce contracts which had the effect to suppress competition. It was believed and declared by those who built up that system of jurisprudence that the public interests were best subserved when commerce and trade were left unfettered by combinations and agreements which had the effect to destroy competition in whole or in part. It was in the same spirit, and with the same end in view, that congress passed the act under consideration, which is aimed to maintain interstate commerce upon the basis of free competition, and contracts which have the necessary tendency

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to restrain that freedom are within the condemnation of the law. The courts are not concerned with the policy of such a law. It is not for them to inquire whether it be true, as is often alleged, that this is a mistaken public policy, and combinations, in the reduction of the cost of production, cheapened transportation, and lowered cost to the consumer, have been productive of more good than evil to the public. The constitution has delegated to congress the right to control and regulate commerce between the states. In the exercise of this right, it has declared for that policy which shall keep competition free, and leave interstate commerce open to all, without the right to any to fetter it by contracts or combinations which shall put it under restraint.

Looking, then, to the contract in question, we find 14 of the coal producers of this district, whose aggregate production is 5,000 tons a day, entering into an agreement which, without making a partnership, undertakes to control the entire output of the several mines for shipment west by a leading route. Examining its provisions, we find that these 14 independent operators, who theretofore were competing in the open market for the trade which is the subject of this contract, are now prevented from any independent action in fixing prices, but are obliged to sell at a price fixed by the executive committee, or not to sell at all. One of the witnesses introduced by the defendants said in the course of his testimony:

"I suppose before this contract went into effect the operators were not generally informed as to what each other were receiving, and that each received his own price."

Undoubtedly the market price was generally controlling, but the price was not fixed by arbitrary agreement, and was left to the operation of the natural laws of open competition. Under this agreement no member of the association is permitted to sell coal or coke bound to points west on the railroad except under the terms and conditions of the contract, and the fuel company cannot directly or indirectly become interested in the buying or selling of bituminous coal or coke of any members of the association, or coal or coke in competition with coal or coke of members of the association, except under the terms of the agreement. Monthly reports are to be made, showing the tonnage of the various

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kinds of coal and coke shipped by the various members of the association, and weighed during the month, together with an average price of each grade of coal or coke so shipped and weighed, which average price is to be computed upon the basis of the actual [621] price, less gross profits, if any, received for all coal and coke sold, and the minimum price as fixed by the contract for coal and coke not sold in such month, and settlement to be made with the members of the association according to the prices fixed. The fuel company is to receive a gross profit of not to exceed 10 cents a ton, and the amount realized each month in excess of said profit, over and above the minimum price, is to be paid to the members of the coal association. The executive committee of the coal association is required, not later than the 20th day of each month, to designate the percentage of the total product of each class and grade of coal and coke which they deem best to be shipped by each member of the association under the terms of the contract.

A consideration of these provisions, assuming that the contract relates to interstate commerce, would seem to make plain the violation of the statute of 1890. Here are 14 dealers who have neither formed a corporation nor a partnership, but have limited to the terms of this agreement their rights for five years in the mining and shipping of coal upon one of their main outlets to the market. They have restricted their right to produce coal for such shipment to the amount designated by the committee. They have restricted sales to this purchaser to a price to be fixed by the committee. They have eliminated competition in the market among themselves. They have restricted the purchaser so that he may not buy from others in competition with themselves. If we correctly interpret the decisions of the supreme court, these provisions clearly restrain the freedom of interstate commerce, which it is the purpose of this statute to maintain unfettered by such contracts and combinations. While it is admitted that some restraint may result upon commerce by these provisions, it is strenuously argued by the learned counsel for the defendants that such restrictions among a portion of the coal dealers of a district are only ancillary to a main lawful purpose, resulting in larger com-

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petition, and greater freedom and volume of interstate trade, and do not violate the act. In support of this contention, Judge Taft's opinion in the Addyston Pipe Co. Case, *supra*, is cited, in which, after summarizing the five instances in which the common law upheld covenants in partial restraint of trade, the learned judge said:

"It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."

And the judge quotes from Chief Justice Tindal in *Horner v. Graves*, 7 Bing. 735, to the effect that in such cases it is to be considered whether the restraint imposed by the contract is only fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. If the unreasonable restraint, as at the common law, was the test of the validity of such contracts, we might inquire whether this agreement [622] did not contain certain restrictions entirely unnecessary to the protection of the fuel company in acquiring the coal from the association, which restrictions are inimical to the public interest. But it is to be remembered that the test of the common law as to the reasonableness of the restraint of commerce is not the test of the validity of such agreements, within the provision of the statute. This proposition was decided by the supreme court in the *Trans-Missouri Case*, *supra*, and affirmed in later cases. Not that every case of incidental restraint makes a contract void, but the question is, is it the effect of the contract to directly restrain interstate commerce? Upon this question the supreme court has said (*Joint Traffic Ass'n Case*, 171 U. S. 567, 568, 19 Sup. Ct. 31, 43 L. Ed. 287):

"Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment, of two or more producers, of the same person to sell their goods on commission, was a matter in any degree in restraint of trade.

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"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.'"

And in the *Addyston Case*, 175 U. S. 245, 20 Sup. Ct. 109, 44 L. Ed. 149, the court says:

"All the facts and circumstances are, however, to be considered in order to determine the fundamental question, whether the necessary effect of the combination is to restrain interstate commerce."

And it is argued that the main purpose of this agreement being to increase the trade of the parties, to enhance competition in a larger field, and improve the character of the product, these objects are beneficial to the public, as well as to the private parties, lawful in their scope and purpose, and justifying the indirect and partial restraint of trade involved in the execution of the agreement. The argument here advanced would be available to nearly every combination of this kind. Wider markets and more trade may be the inducements to such agreements, but they are purposes which the act of congress does not permit to interfere with the freedom of interstate traffic. It would, however, be closing our eyes to the situation and the terms of the contract not to perceive that the limiting of competition was a moving purpose in entering into this agreement. Not only are the 14 operators who signed the agreement limited in prices and trade and production to the governing action of the executive committee, but in the nineteenth paragraph of the contract it is provided that any person, firm, or corporation now or hereafter producing coal to be shipped on the Chesapeake & Ohio Railroad may become a party to the contract by signing the same; such parties to be ad- [623] mitted, by a majority vote of the members, to full participation in the benefits and obligations of the contract. The parties may well be concluded to have intended, in what they did, to put an end to competition in the district in shipments to the Western market to be reached by the Chesapeake & Ohio

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Railroad, by getting all the operators into an agreement to sell for a single price, to be fixed by a committee of their number, and to limit competition among themselves in markets near and remote, within the scope of the agreement. It is to be remembered in this connection that it is the effect of the contract upon interstate commerce, not the intention of the parties in entering into it, which determines whether it falls within the prohibition of the statute. The *Trans-Missouri Case*, 166 U. S. 341, 17 Sup. Ct. 540, 41 L. Ed. 1007; the *Addyston Case*, 175 U. S. 234, 20 Sup. Ct. 96, 44 L. Ed. 136. It is, moreover, contended that the effect of this agreement has been the reduction of prices to the consumer. In determining whether a combination restrains interstate commerce, it is not only the effect upon consumers which is to be considered, but, as well, the effect upon others in the business, who, from choice or necessity, are left outside of the organization. As is said in the *Trans-Missouri Case*, 166 U. S. 323, 17 Sup. Ct. 552, 41 L. Ed. 1021:

"In business or trading combinations, they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital."

In the present case, if the scheme of this combination shall prevail, until nearly all of the operators in this district have availed themselves of the opportunity contained in the contract and become parties to it, the effect upon dealers who have not its large facilities, and may be unable to compete for the contracts and meet the prices fixed by the committee, cannot be otherwise than disastrous. And when the small dealer has been driven out, the combination is one step nearer to the power to control the market.

It is further contended that the competition is such in the market for which this coal is intended, and the coal produced by the operators, parties to this agreement, is such a small fraction of the quantity sold, that it cannot affect

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prices materially. It is not required, in order to violate this statute, that a monopoly be created. It is sufficient if that be the necessary tendency of the agreement. In *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, Chief Justice Fuller said:

"Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from a free competition." Quoted with approval in the *Addyston Case*, 175 U. S. 237, 20 Sup. Ct. 96, 44 L. Ed. 136.

[624] The statute is not limited to contracts or combinations which monopolize interstate commerce in any given commodity, but seeks to reach those which directly restrain or impair the freedom of interstate trade. The law reaches combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge "trust" which shall control the production and sale of a commodity.

Again, it is argued that the features of the contract which fix the minimum to be taken by the fuel company in excess of the former production of the mines, and permit a proportionate reduction of the minimum quantity to be taken when the price is fixed so high that the fuel company cannot meet the market, are evidences that this is no more than an agreement to make the fuel company the common agent of the parties for the sale of the product of the mines at the market price. The answers to this position are obvious. In the constitution of such an agency the restrictive features of this contract are unnecessary. Should the fuel company be unable in all cases to meet the price fixed, the parties are nevertheless prohibited, during the life of the contract, from dealing with others, or selling at a less price than the committee has fixed, and the purchaser is not at liberty to deal with competitors for a supply of coal for this market. "It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity that is regarded." The *Addyston Case*, 175 U. S. 245, 20 Sup. Ct. 109, 44 L. Ed. 149.

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We think this contract, within the meaning of the statute, is in restraint of interstate commerce, and tends to create monopoly.

That the contract under consideration has relation to interstate commerce, within the meaning of the act, we think not doubtful. The coal was contracted for to be sold in the Western market. It is declared to be a main purpose of the contract to extend that market. The coal was in fact shipped to a number of Western states. The payments were to be made for the coal upon the basis of a 10 per cent. profit to the fuel company, and the excess to go to the members of the coal association. These sales were made, as it was intended and stipulated that they should be, in the Western states. Upon this subject, speaking for the court in the *Addyston Case*, 175 U. S. 241, 20 Sup. Ct. 107, 44 L. Ed. 147, Mr. Justice Peckham said:

"If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute. The power to regulate such commerce—that is, the power to prescribe the rules by which it shall be governed—is vested in congress; and, when congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent, and to the same extent infringes upon the power of the national legislature and violates the statute."

Within this principle, we think the contract and combination under consideration have relation to interstate commerce.

The judgment of the circuit court is affirmed.

[70] BEMENT *v.* NATIONAL HARROW COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 215. Argued April 9, 10, 1902. Decided May 19, 1902.

[186 U. S., 70.]

Any one sued upon a contract may set up, as a defence, that it is a violation of an act of Congress.

The object of the patent laws is monopoly, and the rule is with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee,

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and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts; and the fact that the conditions in the contracts keep up the monopoly, does not render them illegal. The prohibition was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others, who were engaged in manufacturing and selling other machines under other patents; but it would be unreasonable to so construe the provision, as to prevent the defendant from using any letters patent legally obtained by it and not infringing patents owned by others.

Upon the facts found, there was no error in the judgment of the Court of Appeals, and it is affirmed.^a

[46 L. ed., 1058.]^b

[The defense that a contract is in violation of the act of Congress of July 2, 1890 (26 Stat. L., 209, chap. 647), to protect trade and commerce against unlawful restraints and monopolies, which makes illegal every contract violative of its provisions, may be set up by a private individual when sued thereon, and, if proved, constitutes a good defense to the action.]

[Conditions imposed by the patentee in a license of the right to manufacture or sell the patented article, which keep up the monopoly or fix prices, do not violate the act of Congress of July 2, 1890 (26 Stat. L., 209, chap. 647), to protect trade and commerce against unlawful restraints or monopolies.]

[Reasonable and legal conditions imposed by the patentee in a license of the right to manufacture and sell the patented article, restricting the terms upon which the article manufactured under such license may be used, and the price to be demanded therefor, do not constitute such a restraint on commerce as is forbidden by the act of Congress of July 2, 1890 (26 Stat. L., 209, chap. 647), to protect trade and commerce against unlawful restraints and monopolies.]

[The agreement of the licensee of a patent for improvements relating to float spring tooth harrows, not to manufacture or sell any other such harrows than those which it had made under its patents before assigning them to the licensor, or which it was licensed to manufacture and sell under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by such licensor, is not void as an unlawful restraint on trade or commerce forbidden by the act of Congress of July 2, 1890 (26 Stat. L., 209, chap. 647), since the plain purpose of this provision is to prevent the licensee from infringing on the rights

^a The foregoing syllabus copyrighted, 1902, by The Banks Law Publishing Co.

^b The following paragraphs inclosed in brackets are taken from the syllabus to this case in the United States Supreme Court Reports, Book 46, p. 1058. Copyrighted, 1902, by The Lawyers' Co-Operative Publishing Co.

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of others under other patents, and not to stifle competition or prevent the licensee from attempting to make any improvement in harrows.]

[An agreement by the licensor of a patent for improvements relating to harrows, not to license any other person than the licensee to manufacture or sell any harrow of the peculiar style and construction then used or sold by such licensee, does not violate the act of Congress of July 2, 1890 (26 Stat. L., 209, chap. 647), to protect trade and commerce against unlawful restraints and monopolies.]

THIS was a writ of error to the Supreme Court of the State of New York, to which court the record had been remitted after a decision of the case by the Court of Appeals. The action was brought by the plaintiff below, the defendant in error here, [71] a corporation, to recover the amount of liquidated damages arising out of an alleged violation by the defendant below, the plaintiff in error here, also a corporation, of certain contracts executed between the parties, in relation to the manufacture and sale of what are termed in the contracts "float spring tooth harrows," their frames and attachments applicable thereto, under letters patent owned by the plaintiff. The action was also brought to restrain the future violation of such contracts, and to compel their specific performance by the defendant. The case was tried before a referee pursuant to the statute of New York providing therefor, and he ordered judgment in favor of the plaintiff for over twenty thousand dollars, besides enjoining the defendant from violating its contract with the plaintiff, and directing their specific performance as continuing contracts. This judgment was reversed by the appellate division of the Supreme Court and an order made granting a new trial, but on appeal from such order the Court of Appeals reversed it and affirmed the original judgment. The defendant brings the case here by writ of error.

The particular character of the action appears from the pleadings. The complaint, after alleging the incorporation of both parties to the action, the plaintiff in New Jersey and the defendant in Michigan, averred that about April 1, 1891, the plaintiff's assignor, a New York corporation, entered with the defendant into certain license contracts, called therein Exhibits A and B. The substance of contract A is as follows:

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It stated that the plaintiff was the owner of certain letters patent of the United States, which had been issued to other parties and were then owned by the plaintiff, for improvements relating to float spring tooth harrows, harrow frames and attachments applicable thereto, eighty-five of which patents were enumerated, and that the defendant desired to acquire the right to use in its business of manufacturing at Lansing, (in the State of Michigan,) and to sell throughout the United States, under such patents or some one or more of them, and under all other patented rights owned or thereafter acquired by the plaintiff, which applied to and embraced the peculiar construction employed by the defendant, during the term of such patents or either or any [72] thereof, applicable to and embracing such construction. The plaintiff then, in and by such contract, gave and granted to the defendant the license and privilege of using the rights under those patents in its business of manufacturing, marketing and vending to others to be used, float spring tooth harrows, float spring tooth harrow frames without teeth and attachments applicable thereto; a sample of the harrow frames and attachments the defendant was licensed to manufacture and sell, being (as stated) in the possession of the treasurer of the plaintiff, and marked and numbered as set forth in schedule A, which was made a part of the license. The license was granted upon the terms therein set forth, which were as follows:

(1) The defendant was to pay a royalty of one dollar for each float spring tooth harrow or frame sold by it pursuant to the license, to be paid to the plaintiff at its office in the city of Utica in the State of New York.

(2) The defendant was to make verified reports of its business each month and mail them to the plaintiff, and the defendant agreed that it would not ship these harrows to any person, firm or corporation to be sold on commission, or allow any rebate or reduction from the price or prices fixed in the license, except to settle with an insolvent debtor for harrows previously sold and delivered.

(3) The defendant agreed that it would not during the continuance of the license sell its products manufactured under the license at a less price or on more favorable terms of payment and delivery to the purchasers than was set forth in

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schedule B, which was made a part of the license, except as hereinafter provided.

(4) The plaintiff reserved the right to decrease the selling price and to make the terms of payment and delivery more favorable to the purchasers, and it might reduce the royalty on the harrows manufactured under the license.

(5) The plaintiff agreed to furnish license labels to the defendant, which were to be affixed to each article sold, and the amount of ten cents paid for each of such labels was to be credited and allowed on the royalty paid by the defendant at the time of such payment.

[73] (6) The defendant agreed that it would not, during the continuance of the license, be directly or indirectly engaged in the manufacture or sale of any other float spring tooth harrows, etc., than those which it was licensed to manufacture and make under the terms of the license, except such as it might manufacture and furnish another licensee of the National Harrow Company, and then only such constructions thereof as such other licensee should be licensed by the plaintiff to manufacture and sell, except such other style and construction as it might be licensed to manufacture and sell by the plaintiff.

(7) The defendant agreed to pay to the plaintiff for each and every of the articles sold contrary to the strict terms and provisions of the license, the sum of five dollars, which sum was thereby agreed upon and fixed as liquidated damages.

(8) The defendant agreed not to directly or indirectly, in any way, contest the validity of any patent applicable to and embracing the construction which the defendant was licensed to manufacture, or which it might manufacture, for another licensee, which such other licensee was itself licensed to manufacture or sell, or the reissues thereof, and no act of either party should invalidate this admission. The defendant also agreed not to alter or change the construction of the float spring tooth harrows, float spring tooth harrow frames, without teeth or attachments applicable thereto, which it was authorized to manufacture and sell under the license, in any part or portions thereof which embody any of the inventions covered by the letters patent, or any of them, or any reissues thereof.

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(9) The plaintiff agreed that after the license was delivered it would not grant licenses or let to any other person the right to manufacture the articles named of the peculiar style and construction or embodying the peculiar features thereof used by the defendant, as illustrated and embodied in the sample harrow then placed in the possession of the treasurer of the plaintiff and referred to in schedule A of the license.

(10) Nothing contained in the license was to authorize the defendant to manufacture or vend, directly or indirectly, any other or different style of harrow than duplicates of such samples as had been deposited by it with the plaintiff, and such as were embraced in the license.

(11) Any departure from the terms of the license might at the option of the plaintiff be treated as a breach of the license, and the licensee might be treated as an infringer, or the plaintiff might restrain the breach thereof in a suit brought for that purpose and obtain an injunction, the licensee waiving any right of trial by jury; such remedy was to be in addition to the liquidated damages already provided for.

(12) The termination of the license by the plaintiff was not to release the defendant from its obligation to pay for articles sold up to the termination of the license.

(13) The plaintiff agreed to defend the defendant in any suit brought for an alleged infringement.

(14) No royalties were to be paid for articles exported for use in a foreign country.

(15) The license was personal to the licensee and not assignable, except to the successors of the defendant in the same place and business, without the written consent of the plaintiff, nor were the royalties or other sums specified to cease to be paid under any circumstances, except under the conditions named in the license during the continuance thereof.

(16) The parties agreed that the license should continue during the term of the patent or patents applicable to the license and during the term of any reissues thereof.

(17) The place of the performance of the agreement was the city of Utica, New York, and the agreement was to be

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construed and the rights of the parties thereunder determined according to the laws of New York.

(18) The consideration of the contract or license was one dollar, paid by each of the parties to the other, and the covenants contained therein to be performed by the other, and it applied to and bound the parties thereto, their successors, heirs and assigns.

Schedule A which followed contained a description of the particular kinds of harrow which the defendant was authorized to make and sell under the license. Schedule B contained a statement of the prices and terms of sale under the license, and it was [75] therein stated that "A maximum discount of forty-two per cent may be allowed on sales of harrows, frames and teeth in the following territory: All of the New England States, also States of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and West Virginia. A maximum discount of forty-five per cent may be allowed on all sales in the territory throughout the United States not mentioned above."

This contract or license was signed by the president of the National Harrow Company for the plaintiff, and A. O. Bement, president of the defendant corporation, for the defendant.

The other license, called Exhibit B, was in substance the same as Exhibit A, excepting that the privilege of sale for the articles manufactured was that portion of the territory embraced within the United States lying south, and west of Virginia, West Virginia and Pennsylvania, and there was some difference in the machines which the defendant was authorized to manufacture and sell under this license, and in regard to the prices to be charged for those machines not covered by the former contract or license.

These two agreements were, as stated, made parts of the plaintiff's complaint, and the plaintiff then set forth various alleged violations of the two agreements on the part of the defendant, and claimed a recovery of a large amount of damages under the provisions of the contracts, and prayed for an injunction restraining future violations and for a specific performance of the contracts.

The plaintiff also alleged that the plaintiff's assignor, the

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New York corporation, duly assigned to the plaintiff all its rights and interests in regard to the subject-matter of the two contracts, and that the plaintiff, at the time of the commencement of the action, was the lawful owner of all such interests and rights, and was entitled to bring the action in its own name.

To this complaint the defendant made answer, denying many of its allegations and setting up certain other agreements which it alleged had been made by the plaintiff and other parties, including defendant, and which, as averred, amounted to a combination of all the manufacturers and dealers in patent harrows, to regulate their manufacture and to provide for their sale and [76] the prices thereof throughout the United States. It was also in the answer averred that such contracts had been pronounced to be void by the Supreme Court of New York, and the contracts now before the court were, as contended by defendant, but a continuation and a part of the other contracts already declared void, and that these contracts between the parties to this action were also void. It also alleged that all of the various contracts were in violation of the act of Congress, approved July 2, 1890, being chapter 647 of the first session of the Fifty-first Congress, (26 Stat. 209,) entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

The case was referred to a referee to hear and decide, who, after hearing the testimony, reported in favor of the plaintiff. The material portions of his report are as follows:

"That for some time prior to the month of September, 1890, the spring tooth harrow business was conducted by the following-named parties: D. C. & H. C. Reed & Company, of Kalamazoo, Mich.; G. B. Olin & Company, Perry and Canandaigua, N. Y.; Chase, Taylor & Company, W. S. Lawrence, doing business under the name of Lawrence & Chapin, both of Kalamazoo, Mich.; J. M. Childs & Company, of Utica, N. Y.; and A. W. Stevens & Son, of Auburn, N. Y., who began the harrow business in substantially the order named above.

"The first two above-named firms conducted their business in separate portions or territory of the United States, under the same United States letters patent, and the other firms began their business in hostility to the same letters patent. The first two firms began a number of patent lawsuits against the other firms and their customers for infringement of patents. These suits were vigorously prosecuted and the court finally decided the patents valid, and ordered an accounting of profits against the firm of Chase, Taylor & Company, and W. S. Lawrence.

"Prior to September, 1890, the last four of the above-named firms settled their disputes over patents with the first two firms, and took

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licenses under their letters patent. Considerable sums of money were paid in settlement of these disputes and rights; and prior to said date, September, 1890, there was no other relation between the first two firms named, and the other parties [77] than that of licensor and licensee under United States letters patent.

"In the year 1890, and just prior thereto, other persons, firms and corporations began the spring tooth harrow business and other patent lawsuits followed: Suits were begun against the defendants herein, and against their customers purchasing their spring tooth harrows; and one case, had gone to final decree, in which the defendant was ordered to account for profits and damages; and an injunction had been granted in other suits. Proceedings were pending upon an application for rehearing in these cases.

"In September, 1890, the six firms first above named decided to organize a corporation known as the National Harrow Company of New York, with a view to transferring various United States letters patent owned by the six firms respectively to said corporation, and for the purpose of conducting the manufacture of some part or portion of the material which entered into their spring tooth harrow business.

"In the conduct of the spring tooth harrow business, the harrows came to be known in the market as 'float spring tooth harrows,' that name having been adopted to differentiate the harrows from those known in the market as 'wheel harrows,' which had frame bars and curved spring teeth supported from an axle above, which axle had wheels at either end of the diameter above thirty inches. The two classes of harrows were differentiated, one being called a 'float' and the other a 'wheel' spring tooth harrow. The litigations had been wholly over the 'float' spring tooth harrows.

"The members composing the first six firms, above named, in the harrow business in September, 1890, organized under the laws of the State of New York the 'National Harrow Company.' That corporation was duly legally incorporated, and after its incorporation it received from the said six firms the transfer of their separate United States letters patent, license contracts and privileges under patents. The defendant's president, Arthur O. Bement, became and continued a director of this corporation until its dissolution, which followed in a little over a year.

[78] "This corporation entered into some contracts with spring tooth harrow manufacturers, which were decided by the Supreme Court of the State of New York to be illegal as against public policy, on account of restraints contained in the contracts, which extended beyond the lifetime of the patents. That case is reported in the New York Supplement, vol. 18, page 224. *Strait et al. v. National Harrow Company et al.*

"Immediately following this decision, all of the contracts then in existence which were affected thereby were immediately cancelled by the parties to such contracts.

"The defendant, E. Bement & Sons, in the fall of 1890, entered into a contract with the National Harrow Company, looking to the selling of its patents and rights under patents relating to the spring tooth harrow business; but this contract was abandoned, the conditions upon which it was executed not having been complied with, the contract became and was wholly void.

"The defendant had no contract with the National Harrow Company until about June 16 or 17, 1891, at which time several contracts were entered into between the defendant and the National Harrow Company of New York. Among other contracts the defendant executed and delivered assignments in writing of several United States

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letters patent and license rights and privileges under United States letters patent, all of which related to the defendant's float spring tooth harrow business. Such contracts constituted an absolute sale of the property and privileges thereby transferred, and the defendant agreed to accept in payment thereof the paid-up capital stock of the National Harrow Company of New York, and the value of the rights transferred were by agreement between the parties fixed and determined by arbitration, under which arbitration the defendant was awarded and the value was fixed at upwards of \$29,000. The defendant was dissatisfied with the amount of the award, and such dissatisfaction and difference was afterwards adjusted by an agreement to issue to the defendant and the defendant to accept an additional amount of \$16,000 of said capital stock. That by agreement, in the place of the said capital stock of the New York company, the defendant accepted [79] and agreed to take the stock of the plaintiff in this action, and there has been issued to the defendant and the defendant has received the capital stock of this plaintiff in an amount upwards of \$45,000 in payment for the property and rights sold and transferred by the defendant to the National Harrow Company of New York. That said upwards of \$45,000 of stock was issued to the president of the defendant for defendant's benefit, and on said stock defendant has received several cash dividends.

"The transaction between the National Harrow Company of New York and this defendant had, in June, 1891, was intended by the parties to be an absolute sale by the defendant to the National Harrow Company of New York of the United States letters patent and licenses under United States letters patent relating to the float spring tooth harrow business conducted by the defendant, and it was found on a good, valuable and adequate consideration moving between the parties.

"That, as a part of such transaction, the National Harrow Company of New York granted, issued and delivered to the defendant the license contracts A and B, which are attached to the complaint in this action and made a part thereof. Upon the consummation of the transaction in June, 1891, the controversy over patents and infringements existing between the first six firms named above, and the defendant and its customers, was settled. The papers which were executed in June, 1891, were all dated as of April 1, 1891, and were to take effect as of that date. At the date of the execution and delivery of the license contracts A and B, the National Harrow Company of New York was the owner by assignment and purchase of a large number of United States letters patent, which it is claimed fully monopolized and covered the defendant's float spring tooth harrow business.

"The sale by the defendant of its letters patent, and license rights and privileges to the National Harrow Company of New York, and the signing and delivering of license contracts A and B, were intended to and did, settle existing controversies with reference to the rights of the National Harrow Company of New York and the defendant.

[80] "I decide that the contract entered into in June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant were and are good and valid contracts, founded on adequate considerations and were reasonable in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept.

"In July, 1891, a corporation was organized under the laws of the State of New Jersey, known and designated as the National Harrow Company, which corporation is the plaintiff in this action. None of the parties organizing this corporation were in the spring tooth harrow business. The New Jersey corporation was duly and legally or-

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ganized in conformity with the laws of that State, and was by those laws and its charter authorized to purchase United States letters patent and to grant licenses under United States letters patent and to conduct the manufacturing business, and had a variety of other rights and privileges under its charter and said statutes. That this corporation, the plaintiff, still is a legal and valid corporation, entitled to hold and enjoy such of its property as it now or may hereafter own or acquire, and that it was not organized in hostility to any rule of public policy.

"That the National Harrow Company of New Jersey, this plaintiff, through its duly constituted officers purchased from the National Harrow Company of New York all of its various United States letters patent, and all contracts, licenses and privileges which the National Harrow Company of New York then owned and possessed, and also purchased a part of its other property, rights and privileges.

"That on the 9th of September, 1891, a formal transfer in writing was made from the National Harrow Company of New York to the National Harrow Company of New Jersey of the property and rights sold as aforesaid by the former company to the latter, which transfer was founded on a good, valuable and edequate consideration moving between the parties, and which transfer was sanctioned by the directors and stockholders of the New York corporation, and by the officers and [81] directors of the National Harrow Company of New Jersey, this plaintiff, and separate assignments in writing were made of the various United States letters patent from the New York corporation to the New Jersey corporation.

"I decide that this transfer was in all respects legal and valid, being founded on a good and valuable consideration, and that it vested in the plaintiff in this action all the rights, privileges and benefits accruing to the New York corporation under its contracts with the defendant, including contracts A and B, which contracts have been slightly modified by the parties as to price and terms of sale.

"The defendant's president, Arthur O. Bement, became a director and an active manager of the plaintiff, and continued as such down to September, 1893.

"The defendant made monthly verified reports to this plaintiff down to and including the 8th of September, 1893, of the harrows embraced in contracts A and B, by such reports stating the total harrows sold to be 13,900, on which defendant paid to the plaintiff a royalty of \$13,900.

"The National Harrow Company of New York and this plaintiff have performed all of the stipulations and provisions in the contracts entered into between the National Harrow Company of New York and this defendant, including all the provisions of contracts A and B, and the plaintiff is now ready, willing and able to perform all of the stipulations and agreements to be performed on its part, as assignee of the National Harrow Company of New York.

"That the defendant, after having received and retained large pecuniary benefits under the contracts, has failed, neglected and refused, and still fails, neglects and refuses to keep and perform its contracts entered into, including the stipulations and provisions contained in contracts A and B, and since September, 1893, it has wholly repudiated contracts A and B, and refused to perform any of the stipulations contained therein which it agreed to do and perform, and it has broken and violated all of the stipulations and agreements contained in contracts A and B which it agreed to do and perform."

The referee then states with some detail the various violations [82] of the license agreements by the defendant, and finds the defendant indebted to the plaintiff in the sum of

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over twenty thousand dollars. He then continues as follows:

"I decide that the plaintiff is a legal and valid corporation authorized to enforce its rights in courts having jurisdiction, and that all of the contracts in evidence were and are legal, valid and binding contracts, such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints, and are not repugnant to any rule of public policy as in restraint of trade, or tending to create a monopoly, trust or any other illegal combination; and that the contracts entered into between the defendant and the National Harrow Company of New York, including contracts A and B, are and were intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted."

The referee then held the plaintiff entitled to a judgment against the defendant, declaring the validity of the plaintiff corporation and its title to the contracts and their validity, and decreeing specific performance thereof and restraining future violations of the contracts by the defendant. Judgment in accordance with the report was entered, from which the defendant appealed to the appellate division of the Supreme Court.

Some difficulties regarding the form in which the case was presented to that court arose upon the argument, and it was therefore suspended and the case sent back to the referee for a resettlement, which was subsequently agreed upon by counsel for the respective parties, who entered into a stipulation in regard to what was to be reviewed by the courts above, and, among other things, it was agreed between counsel: "That the foregoing record, as amended and corrected in this stipulation, contains all of the evidence given and proceedings had before the referee material to the questions to be raised on this appeal by the appellant, which questions to be raised by the appellant on this appeal are to be only as follows." Those questions are eight in number, the fourth of which is: "Whether or not the contracts A and B are valid under the act of Congress approved July 2, 1890, chapter 647 of the first [83] session of the Fifty-first Congress." This is the only Federal question raised and appearing in the record.

The case was thereupon argued before the appellate division, which reversed the judgment, and ordered a new trial, but it did not state in its order of reversal that the judgment was reversed on questions of fact as well as of law. The

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plaintiff then appealed to the Court of Appeals from the order granting a new trial, and after argument it was held by that court that it had no jurisdiction to review the facts, and that upon the findings of the referee there had been no error of law committed, and consequently the Supreme Court was wrong in reversing the judgment. The court therefore reversed the judgment of the Supreme Court, and affirmed the judgment entered upon the report of the referee.

Mr. Clark C. Wood, Mr. Edward Cahill and Mr. Henry J. Cookingham for plaintiff in error.

Mr. Edwin H. Risley for defendant in error.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court.

In this court we are concluded by the findings of fact made in a state court in a suit in equity, as well as in an action at law. *Dower v. Richards*, 151 U. S. 658, 666; *Israel v. Arthur*, 152 U. S. 355; *Egan v. Hart*, 165 U. S. 188; *Hedrick v. Atchison, Topeka & Santa Fé Railroad Company*, 167 U. S. 673, 677.

The only Federal question raised in the record is as to the validity of contracts A and B, with regard to the act of Congress on the subject of trusts. Act of July 2, 1890, c. 647, 26 Stat. 209. That is a question of law, plainly raised in the record, and we are not precluded from its consideration by any action of the state courts. If, however, facts not found by the referee are necessary for the purpose of connecting those contracts with others not found in such report, we cannot supply the omission to find those facts. The contention of the defendant is that [84] the two contracts A and B are in truth a part and continuation of the agreements set forth in the defendant's answer, and that taken together they prove a purpose and combination on the part of all the dealers in patented harrows to control their manufacture, sale and price in all portions of the United States, and defendant avers that such a contract or combination was and is void, not only as against public policy, but also because it is a violation of the Federal statute upon the subject of trusts and illegal combinations. Those former al-

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leged contracts are not mentioned in the report of the referee excepting, as he stated, they had been declared void as against public policy, and as being in restraint of trade because they extended beyond the life of the patents therein mentioned, and the referee found that following this decision all of the contracts then in existence, which were affected thereby, were immediately cancelled by the parties thereto.

The referee made no finding of any fact connecting the contracts A and B with prior contracts of a like nature including other parties, as alleged in the answer of the defendant. The referee did find, however, that the defendant had no contract with the National Harrow Company until June 16 or 17, 1891, at which time several contracts were entered into between the plaintiff and the National Harrow Company of New York, and among other contracts the plaintiff executed and delivered assignments in writing of several United States letters patent and license rights and privileges under United States letters patent, all of which relate to the defendant's float spring tooth harrow business. He also found that such contracts constituted an absolute sale of the property and privileges thereby transferred, and that the defendant agreed to and did accept in payment thereof paid up capital stock of the plaintiff. He further found that the transaction between the assignor of the plaintiff and the defendant in June, 1891, was intended by the parties to be an absolute sale by the defendant to such assignor of the United States letters patent and licenses under such patents relating to the float spring tooth harrow business conducted by the defendant, and that it was founded upon a good, valuable and adequate consideration between the parties; that as a part of such consider- [85] ation the assignor of the plaintiff granted and delivered to the defendant the license contracts A and B, heretofore spoken of, and that upon the consummation of the transaction the controversy over patents and infringements existing between the first six firms named in the referee's report and the defendant and its customers was settled. The report also decided "that the contract entered into in June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant were and are

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good and valid contracts, founded on adequate considerations and were reasonable in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept."

The omission of the referee to find from the evidence that the contracts A and B were a continuation of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered into the same kind of contracts with plaintiff as those denominated A and B, and that there was a general combination among the dealers in patented harrows to regulate the sale and prices of such harrows, furnishes no ground for this court to assume such facts. The contracts A and B are to be judged by their own contents alone and construed accordingly.

The referee also decided that the plaintiff was a legal and valid corporation, authorized to enforce its rights in courts having jurisdiction, and that all the contracts in evidence might reasonably be made under the circumstances, and were founded upon a good, valuable and adequate consideration, and were reasonable in their provisions, and that they were and are legal, valid and binding contracts, and such as embodied no illegal restraints, and were not repugnant to any rule of public policy as in restraint of trade, and were not intended to create a monopoly, trust or illegal combination, and that the contracts entered into between the defendant and the National Harrow Company of New York, including the contracts A and B, are, and were, intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted.

When he speaks of all the contracts in evidence, the referee [86] plainly means all the contracts in evidence between the parties to this action, for it was of such contracts only that he had been speaking. There were, in fact, other contracts than those designated A and B between these parties, and such other contracts had been put in evidence, and previously referred to by the referee. He, therefore, must have included what is termed the escrow agreement in his finding,

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that all the agreements made by defendant with the plaintiffs were valid. That agreement is set forth in the margin.^a

[87] There is no finding by the referee that this agreement was ever signed by any one other than the parties to this action, or that any other person received the licenses from and made contracts with the plaintiff similar to the ones entered into between these parties. All that the referee finds is, that all the contracts in evidence were legal, by which was meant, as already stated, all the contracts in evidence between the parties to the action, which were in existence and uncanceled. In the absence of any finding as to the escrow agreement having been signed by others, it must be regarded as unimportant, and we are brought back to the question

^a "Escrow Agreement.

"This memoranda of agreement, made and entered into this 1st day of April, A. D. 1891, by and between the National Harrow Company, a corporation of Utica, in the State of New York, and Edward Norris of the same place; and E. Bement & Sons of Lansing, in the State of Michigan.

"Whereas, the said National Harrow Company is the owner of a large number of letters patent relating to float spring tooth harrows, and is desirous of granting licenses thereunder to the following-named persons, firms and corporations, to wit: Chas. H. Childs & Company, D. B. Smith & Company, A. W. Stevens & Son, Childs & Jones, Syracuse Chilled Plow Company, Geo. W. Sweet & Company, Walker Manufacturing Company, Taylor & Henry, the Herndeen Manufacturing Company, D. C. & H. C. Reed & Company, L. C. Lull & Company, Williams Manufacturing Company, W. S. Lawrence, McSherry Manufacturing Company, D. O. Everst & Company, E. Bement & Sons, Hench & Dromgold, Farmers' Friend Manufacturing Company, Eureka Mower Company.

"And whereas, the said National Harrow Company has placed in the hands of said E. Norris in escrow, duly executed by it in duplicate, a certain contract and license for each of said persons, firms and corporations hereinbefore named, to be by the said E. Norris immediately presented to each of the above and foregoing named respective persons, firms and corporations, to be signed and executed by said respective persons, firms and corporations—

"Now, therefore, It is hereby understood and agreed by and between the parties hereto, that as the said licenses and contracts are signed and executed by the said respective persons, firms and corporations, they shall be held by said Norris, in escrow, for both parties until such time as all of said above-named persons, firms and cor-

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whether these contracts or licenses, A and B, irrespective of any contracts not found by the referee as in any way connected with, or forming a part thereof, are void as a violation of the act of Congress.

The plaintiff contends in the first place that only the Attorney General of the United States can bring an action under the statute, excepting that by section 7 of the act any person injured in his business or property, as provided for therein, may himself sue in any Circuit Court of the United States, in the district in [88] which the defendant resides or is found. Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that any one sued upon a contract may set up as

porations shall have signed, executed and delivered the same to said Norris, whereupon they shall become operative, and immediately thereafter the said Norris shall deliver one of the duplicates of each of said contracts and licenses to the said National Harrow Company and the other duplicate thereof to the respective licensees who have signed the same, in person or by mail.

"But in case any of the above-named persons, firms and corporations shall neglect or refuse to sign, execute and deliver said respective contracts and licenses on or before the 1st day of June next, then and in such case said E. Norris shall, provided he shall be so directed, by a resolution duly adopted by the board of trustees of said National Harrow Company, make delivery of such of said contracts and licenses as have been signed and executed as above provided, at which time said contracts and licenses shall become operative, and in case the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then and in such case the said Norris shall cancel each of said contracts and licenses, and they shall be null and void.

"Witness the signatures of the parties:

"THE NATIONAL HARROW CO.,

By CHAS. H. CHILDS, *Pres't.*

"EDWARD NORRIS.

"E. BEMENT & SONS,

By A. O. BEMENT, *Pres't.*

"Received of E. Bement & Sons a license and contract executed between the National Harrow Company and said E. Bement & Sons, which I agree to hold and deliver in accordance with an agreement between the said National Harrow Company and said E. Bement & Sons and myself, and hereto attached.

"Dated this 1st day of April, 1891.

EDWARD NORRIS."

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a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action.

The first section of the act provides that "every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defence of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue, but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defence, and we think when proved it is a valid defence to any claim made under a contract thus denounced as illegal.

This brings us to a consideration of the terms of the license contracts for the purpose of determining whether they violate the act of Congress. The first important and most material fact in considering this question is that the agreements concern articles protected by letters patent of the Government of the United States. The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was, therefore, the owner of a monopoly recognized by the Constitution and by the statutes of Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize [89] others to sell it. As stated by Mr. Justice Nelson, in *Wilson v. Rousseau*, 4 How. 646, 674, in speaking of a patent:

"The law has thus impressed upon it all the qualities and characteristics of property for the specified period; and has enabled him to

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hold and deal with it the same as in the case of any other description of property belonging to him, and on his death it passes, with his personal estate, to his legal representatives, and becomes part of the assets."

Again, as stated by Mr. Chief Justice Marshall, in *Grant v. Raymond*, 6 Pet. 218, 241:

"To promote the progress of useful arts, is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries,' is among those expressly given to Congress. This subject was among the first which followed the organization of our Government. It was taken up by the first Congress at its second session, and an act was passed authorizing a patent to be issued to the inventor of any useful art, etc., on his petition, 'granting to such petitioner, his heirs, administrators or assigns, for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, using and vending to others to be used, the said invention or discovery.' The law further declares that the patent 'shall be good and available to the grantee or grantees by force of this act, to all and every intent and purpose herein contained.' The amendatory act of 1793 contains the same language, and it cannot be doubted that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right to their inventions for the time mentioned in their patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received: [90] if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged."

In *Heaton-Peninsular Company v. Eureka Specialty Company*, 47 U. S. App. 146, 160, it is stated regarding a patentee:

"If he sees fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use or permit others to avail themselves of it upon reasonable terms, is doubtless true. This expectation is based alone upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it. The *dictum* found in *Hoe v. Knap*, 17 Fed. Rep. 204, is not supported by reason or authority."

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It is true that in certain circumstances the sale of articles manufactured under letters patent may be prevented when the use of such article may be subject, within the several States, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police regulation. Thus an improvement for burning oil, protected by letters patent of the United States, was condemned by the state inspector of Kentucky as unsafe for illuminating purposes under the statute requiring an inspection and imposing a penalty for [91] the violation of the statute, and it was held that the enforcement of the statute was within the proper police powers of the State, and that it interfered with no right conferred by the letters patent. *Patterson v. Kentucky*, 97 U. S. 501.

There are decisions also in regard to telephone companies operating under licenses from patentees giving them the right to use their patents for the purpose of operating public telephone lines, but prohibiting companies from serving within such district any telephone company, and it has been held in the lower Federal courts that such a prohibition was of no force; that it was inconsistent with the grant, because a telephone company, being in the nature of a common carrier, was bound to render an equal service to all who applied and tendered the compensation fixed by law for the service; that while the patentees were under no obligation to license the use of their inventions by any public telephone company, yet, having done so, they were not at liberty to place restraints upon such a public corporation which would disable it to discharge all the duties imposed upon companies engaged in the discharge of duties subject to regulation by law. It could not be a public telephone company and could not exercise the franchise of a common carrier of messages with such exceptions to the grant. See *Missouri ex rel. &c. v. Bell Telephone Company*, 23 Fed. Rep. 539; *State ex rel. &c. v. Delaware &c. Company*, 47 Fed. Rep. 683; and *Delaware & Atlantic &c. Company v. Delaware ex rel. &c.* 3 U. S. App. 30.

These cases are cited in the opinion of the court in the case of *Heaton-Peninsular Company v. Eureka Specialty Company*, *supra*. Notwithstanding these exceptions, the general

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rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

[92] The contention that they do not affect inter-state commerce, is not correct. We think the licenses do by their terms and by their plain meaning refer to, include and provide for interstate as well as other commerce. The contract called Exhibit B provides for the manufacture at Lansing, Michigan, and for the sale of the articles there made in territory lying south and west of Virginia and West Virginia and Pennsylvania, and the referee finds that a number of harrows have been sold under that contract. The contracts plainly look to the sale, and they also determine the price of the article sold, throughout the United States, as well as to the manufacture in the State of Michigan. As these contracts do, therefore, include interstate commerce within their provisions, we are brought back to the question whether the agreement between these parties with relation to these patented articles is valid within the act of Congress. It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *United States v. Joint Traffic Association*, 171 U. S. 505; *Addystone Pipe &c. Company v. United States*, 175 U. S. 211. But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers.

United States v. E. C. Knight Company, 156 U. S. 1, does not bear upon the facts herein. That case related to a purchase of stock in manufacturing companies, by reason of

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which the purchaser secured control of a large majority of the manufactories of refined sugar in the United States. It was held by this court that the Federal act relating to trusts and combinations affecting interstate commerce could not reach and suppress the creation of a monopoly in regard to the refining of sugar, and that the manufacturing of a commodity bore no direct relation to commerce between the States or with foreign nations. It was said by Mr. Chief Justice Fuller, for the court, while [93] speaking of such manufacture: "Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked."

In these contracts provision is expressly made, not alone for manufacture, but for the sale of the manufactured product throughout the United States, and at prices which are particularly stated, and which the seller is not at liberty to decrease without the assent of the licensor. *Addystone Pipe & Steel Company v. United States*, 175 U. S. 211, 238. These contracts directly affected, not as a mere incident of manufacture, the sale of the implements all over the country, and the question arising is whether the contracts which thus affect such sales are void under the act of Congress.

On looking through these licenses we have been unable to find any conditions contained therein rendering the agreement void because of a violation of that act. There had been, as the referee finds, a large amount of litigation between the many parties claiming to own various patents covering these implements. Suits for infringements and for injunction had been frequent, and it was desirable to prevent them in the future. This execution of these contracts did in fact settle a large amount of litigation regarding the validity of many patents as found by the referee. This was a legitimate and desirable result in itself. The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recog-

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nizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.

It is also objected that the agreement of the defendant not [94] to manufacture or sell any other float spring tooth harrow, etc., than those which it had made under its patents before assigning them to the plaintiff, or which it was licensed to manufacture and make, under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by the plaintiff, is void under the act of Congress.

The plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition in the harrow business more than the patent provided for, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows. It was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others who were engaged in manufacturing and selling other machines under other patents. It would be unreasonable to so construe the provision as to prevent defendant from using any letters patent legally obtained by it and not infringing patents owned by others. This was neither its purpose nor its meaning.

There is nothing which violates the act in the agreement that plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by the defendant. It is a proper provision for the protection of the individual who is the licensee, and is nothing more in effect than an assignment or sale of the exclusive right to manufacture and vend the article. In brief, after a careful examination of these contracts, we are unable to find any provision in them, either taken separately or in connection with all the others

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therein contained, which would render the contracts between these parties void as in violation of the act of Congress.

It must, however, be conceded that the escrow agreement above set forth looks to the signing, by the parties mentioned therein, of contracts similar to those between the parties to this suit, designated A and B, and containing like conditions relating to the patents respectively, owned by such parties. But there is no finding by the referee that such contracts were in fact entered into by those other parties nor that they constituted a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made. If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination. As between these parties, we hold that the agreements A and B actually entered into were not a violation of the act. We are not called upon to express an opinion upon a state of facts not found. Upon the facts found there is no error in the judgment of the Court of Appeals, and it must, therefore, be

Affirmed.

MR. JUSTICE HARIAN, MR. JUSTICE GRAY and MR. JUSTICE WHITE did not hear the argument and took no part in the decision of this case.

[925] FIELD *v.* BARBER ASPHALT PAV. CO.^a

(Circuit Court, W. D. Missouri. July 15, 1902.)

[117 Fed., 925.]

CLOUD ON TITLE—REMOVAL—ACTION IN EQUITY—POSSESSION OF PLAINTIFF.—A suit in equity may be maintained for the removal of a cloud on title under the Missouri statutes, though plaintiff is not in possession.^b

^a See 194 U. S. 618 (p. 555).

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Syllabus.**UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.—**

Where complainant sued to set aside special tax bills assessed against certain lots in a city, of which he owned the fee, and he was the equitable owner of other lots assessed, and the tax bills on all the lots amounted to over \$2,000, the federal court had jurisdiction.

MUNICIPAL CORPORATIONS—SPECIAL TAXES—TAX BILLS—REGISTRATION BY CITY CLERK.—

The failure of a city clerk of a city to register tax bills for special assessments, as required by the Missouri statutes, is not a sufficient defense against the bills, the statute being directory merely.

[926] **SAME—STREET GRADING—ASSESSMENT.—**Where the evidence, in the action to restrain a special city assessment, showed that the grading, for which the city was not entitled to charge the abutting property, was not included, at least to any great extent, in the cost of paving, and no extra charge or expense for the grading was made, the fact that some grading was done was immaterial.

SAME—CITY IMPROVEMENTS—PROTEST—STATUTES—CONSTITUTIONALITY—REVIEW.—Where a nonresident property owner did not appear after notice and attempt to protest against a city street improvement, he cannot, in an action to restrain enforcement of tax bills against his property, obtain a review of the constitutionality of Laws Mo. 1895, § 95, limiting the right to protest to resident owners.

CONTRACT FOR IMPROVEMENT—ACTS OF ALDERMEN—REVIEW.—The board of aldermen of a city, in procuring the improvement of streets and letting the contract therefor, do not act in a legislative capacity, but act in an administrative or business capacity, and hence their acts are reviewable on the ground of fraud or corruption.

VALIDITY OF CONTRACT—LIMITATION AS TO MATERIAL—[ANTI-TRUST LAWS].—Where the contract for the paving of a street with asphalt limited the kind of asphalt to be used to Trinidad asphalt, such fact, and the further fact that such asphalt was controlled by a single corporation, [was not violative of the commerce clause of the constitution or of the Federal anti-trust statutes, and] did not affect the validity of the contract. [See p. 194.]

SAME—EVIDENCE.—Evidence in an action to vacate special tax bills for municipal improvements reviewed, and *held* not sufficient to show corruption on the part of the city council.

SAME—NECESSITY OF IMPROVEMENT—REVIEW.—Where one of the streets of a city, located in an extreme and thinly populated portion, had been well paved with macadam in 1892, and at the time the street was ordered paved with asphalt by the city council, in 1897, the macadam was not badly worn, and the street was in good condition, the subsequent improvement was unnecessary, and special assessments therefor void.

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[The only part of the opinion which has any bearing whatever upon the federal anti-trust law is as follows:]

[929] "The evidence shows that the contracts called for 'Lake Trinidad asphalt.' There is evidence tending to show that good asphalt, and quite as good as Trinidad, can be obtained from Bermuda, Mexico, and from places in the United States. On such facts it is contended that the city had no right to limit the contract to Trinidad, and that in so doing the commerce clause of the constitution was violated, and that the federal anti-trust statutes were likewise violated. And this argument is emphasized by complainant's counsel, because, as he contends, the defendant has a monopoly of Trinidad asphalt. The evidence does not show this to be so. But, if it does have the monopoly, I do not believe the point is well taken. An individual certainly has the right, in the erection of an improvement, to get that which he believes the best, and that which he prefers, regardless of the reason; and he should not defeat a recovery by showing that in fact something else was as good or better, or that the vendor had a monopoly."

[120] GIBBS *v.* McNEELEY ET AL.^a

(Circuit Court of Appeals, Ninth Circuit. October 13, 1902.)

[118 Fed., 120.]

ANTI-TRUST LAW—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—To render a combination unlawful under the anti-trust act of 1890 [U. S. Comp. St. 1901, p. 3200], it need not be one which by its terms refers to interstate commerce, but it is sufficient if its purpose and effect are necessarily to restrain interstate trade.^b

SAME.—An association of manufacturers of and dealers in red cedar shingles in the state of Washington, formed for the purpose of controlling the production and the price of such shingles, which are made only in that state, but are principally sold and used in other states, and which, by its action in closing the mills of its members,

^a Demurrer overruled by Circuit Court as to fourth cause of action (102 Fed., 594). See p. 25. Verdict for defendants in error directed (107 Fed., 210). See p. 71. Reversed by Circuit Court of Appeals (118 Fed., 120).

^b Syllabus and statement copyrighted, 1903, by West Publishing Co.

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has reduced the production, and has also arbitrarily increased the prices at which the product is sold, is a combination in restraint of interstate commerce, and unlawful under the anti-trust law of July 2 1890 [U. S. Comp. St. 1901, p. 3200].^a

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

The plaintiff in error brought an action to recover damages against the defendants in error under the act of congress known as the "Sherman Anti-Trust Act," of July 2, 1890 [U. S. Comp. St. 1901, p. 3200], and alleged in his complaint, as his first cause of action: That for more than 10 years he had [121] been a dealer in Washington red-cedar shingles at the city of Tacoma in the state of Washington, conducting a general business in such shingles, purchasing them of the various manufacturers thereof within the state of Washington, and selling them to purchasers in other states of the United States and in certain foreign countries. That his business was valuable; and that he was solely dependent upon it for his livelihood, and that he had acquired a wide clientele, and had transacted a business amounting to \$100,000 a year, and had derived an annual profit therefrom of \$3,000; that the said Washington red-cedar shingle is solely manufactured in the state of Washington, and has become an article of prime necessity and indispensable use to the people in the various states and countries named; and alleged that, during the first 10 months of the year 1899, 4,000,000,000 shingles were manufactured, of which 3,300,500,000 were manufactured for the purpose of selling and delivering to purchasers outside the state of Washington, and were so sold and delivered. That the defendant the Washington Red-Cedar Shingle Manufacturers' Association was a voluntary association of the various manufacturers and dealers in said shingles in the state of Washington, comprising a total of 108; that the association has a constitution and by-laws; that membership is secured by paying a certain initiation fee graded according to the number and character of shingle machines in use by the applicant for membership; that its officers are president, vice president, secretary, treasurer, and a central committee; that the defendants specifically named in the complaint are respectively such officers; that the powers of the committee were to hold meetings "and issue, from time to time, a minimum price below which all members agree not to sell shingles to dealers or wholesalers," "to establish a system of prices at which shingles must be sold to retail dealers," etc., "to order the closing down of all mills, and to take other necessary steps to curtail the output of Washington red-cedar shingles, when in their judgment the supply should exceed the demand." For a second cause of action, the plaintiff in error alleged, in addition to the facts above set forth, that on or about August 15, 1899, the central committee adopted a schedule of prices for shingles, whereby the members of said association were required to and bound themselves to sell at the price so fixed, to wit: Extra A, \$1.35 per 1,000, Clears, \$1.50 per 1,000, which price the plaintiff alleged was above the market price; the market price then being Extra A, \$1.20 per 1,000, and Clears, \$1.35 per 1,000. That by reason of the said increase in prices the plaintiff was unable to carry on his business and supply the natural and ordinary demand for such shingles, or to purchase shingles at any other than the price so fixed, and he was injured thereby in his business in the

^a See Monopolies, vol. 35, Cent. Dig. §§ 11, 13.

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sum of \$1,200. For a third cause of action, the plaintiff, in addition to the facts above alleged, set forth that on November 11, 1899, for the purpose of further increasing the price of said shingles, the association ordered its mills to close down for the period of 60 days, which order was obeyed, whereby the trade in shingles was interrupted, and he was unable to purchase shingles with which to fill his orders, to his damage in the sum of \$1,000. For a fourth cause of action, in addition to the facts already set forth, the plaintiff alleged that the president, vice president, treasurer, and secretary, together with the central committee, for the purpose of destroying the plaintiff's business, published resolutions adopted at a meeting of the central committee, charging the plaintiff with endeavoring to injure the market for Washington red-cedar shingles, and with having no money invested in his business, and as being without credit and irresponsible, and not an honorable and legitimate dealer in such shingles, and that for the purpose of inducing all wholesale and retail dealers in shingles in the states and foreign countries aforesaid to refuse to buy shingles of the plaintiff, and to induce the manufacturers of shingles to refuse to sell him shingles, they printed and circulated through the mails the said resolutions, and published them in newspapers. And the plaintiff in error set forth in the complaint the names of 253 persons to whom such circulars were sent. He alleged that the result of the conspiracy was to destroy his business, to his damage in the sum of \$15,000. On February 2, 1900, the defendants in the action, by their attorneys, filed a general appearance with the clerk on behalf of all the defendants named in the complaint. The defendants McNeeley and Beckman subsequently appeared separately, and [122] demurred to each cause of action in the complaint for want of jurisdiction of the persons of the defendants, want of jurisdiction of the subject-matter, defect of parties defendant, and the insufficiency of the facts pleaded to constitute causes of action. Upon the last of these grounds of demurrer, the cause was presented in the circuit court before Hanford, District Judge, and the demurrer was sustained as to all except the fourth cause of action. 102 Fed. 594. Upon that cause the case afterward went to trial before Bellinger, District Judge, who directed the jury to return a verdict for the defendants in error upon the ground that the proofs did not sustain the causes of action, and that the combination described in the complaint is not one in restraint of interstate commerce, so as to give a right of action, under the provisions of the act of July 2, 1890 [U. S. Comp. St. 1901, p. 3200], to one who has been injured by a resolution, passed and circulated, denouncing him for cutting prices, and also upon the ground that in the opinion of the court the allegations in the fourth cause of action were insufficient to constitute a cause of action. 107 Fed. 210.

T. O. Abbott and T. L. Stiles, for plaintiff in error.

Charles O. Bates, Charles A. Murray, and John A. McDaniels, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The case having gone to trial before a jury on the fourth cause of action, and having been determined adversely to the

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plaintiff in error on the facts, and it being conceded that the demurrer to the first cause of action was properly sustained, the question which is here presented is whether the facts alleged in either the second or the third cause of action in the complaint constitute a cause of action under the act of July 2, 1890, commonly known as the "Sherman Anti-Trust Act" [U. S. Comp. St. 1901, p. 3200]. The combination which is described in the complaint consists of a combination of manufacturers and wholesale dealers in Washington red-cedar shingles, who reside and carry on their business within the state of Washington, and sell and deliver goods to residents of other states. It is not charged that the defendants in error, or any of them, have entered into any combination or contract with residents of other states. The alleged right of the plaintiff in error to recover is based substantially upon the fact that the combination comprises all the manufacturers and wholesale dealers within the state of Washington, and that they have combined and conspired together to fix an arbitrary price to wholesale and retail dealers for an article of merchandise used in interstate commerce, below which no one is permitted to buy or to sell, and that the price so fixed marks a distinct increase of the market price as it had stood theretofore, and that the association has assumed and exercised, and will continue to exercise, the power to shut down all mills within the state at will, and for so long a time as it may deem necessary. Is this a combination in restraint of interstate commerce, such as is denounced by the statute? There can be no doubt that at common law it is an unlawful combination in restraint of trade. It has the effect to diminish production, abolish competition, and enhance prices. Its illegality is not relieved by the fact that [123] it was induced by the keen competition and the unprofitable condition of the shingle manufacturing business which existed before it was entered into, or by the fact that the prices fixed by the combination may have been reasonable. *Manufacturing Co. v. Klotz* (C. C.) 44 Fed. 721; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; *People v. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep.

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609; *Harrow Co. v. Hench*, 27 C. C. A. 349, 83 Fed. 36, 39 L. Ed. 299; *Cravens v. Carter-Crume Co.*, 34 C. C. A. 479, 92 Fed. 479.

The anti-trust act goes as far, if not farther, than the common law, and declares unlawful all combinations in restraint of interstate trade. In order, therefore, to bring the combination which is under consideration within the interdiction of the act, it must appear that it is more than a mere combination in restraint of trade; it must involve the restraint of interstate or international commerce. It is urged by the defendants in error that merchandise is not subject to the power of congress to regulate commerce until it is in actual transit from one state to another, and that matters occurring prior to the commencement of this final movement are not matters of interstate commerce, but are within the authority of the state, and are wholly unaffected by other authority. *Coe v. Town of Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; and other cases are cited in support of that view. But in *Robbins v. Taxing Dist.*, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. Ed. 694, it was said: "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce;" and the case of *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, is authority for the proposition that the power of congress to regulate commerce is not confined to goods that have begun their movement out of the state in which they are manufactured, but that it extends to negotiations and contracts made preliminary to the manufacture, sale, and shipment of goods in interstate commerce. The court in that case had under consideration a combination between manufacturers located in different states. The combination comprised six corporations, and it was entered into for the purpose of raising prices of steel pipe in certain designated states. Their method of business required the delivery of pipe by the seller at the place where it was to be used by the buyer, and included in the price the cost of delivery. By the terms of the combination, contracts were to be made, after public letting, at the home and in the state of the buyer.

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Requests for bids were to be submitted to a central committee, which was to fix a price, and the contract was to be awarded to that member of the combination who would agree to pay, for the benefit of the other members, the largest bonus. This was the method of business except in certain designated reserved states, in which the successful bidder was to be designated, and the price and bonus were to be fixed by the association. The agreement of the association restrained every defendant, except the one selected to receive the contract, from making a contract for pipe with the intended purchaser. [124] With respect to the sales in the states in which the mills of the defendant were situated, the effect of the agreement was to bind at least three, if not more, of the defendants to make no contract at all in those states for the sale and delivery of pipe in another state. In short, the agreement had the effect to restrain at least three, sometimes four, sometimes five, and sometimes all, of the defendants in interstate trade, which otherwise they would have been permitted to engage in, in selling in one state pipe to be delivered from another state at prices to be determined upon from competition and at market rates. There were other restrictions in the combination, not necessary here to be further specified. The court held that the association was a contract, combination, or conspiracy in restraint of trade, as the terms are understood in the act, and that the subject-matter of the restraint was not articles of merchandise or their manufacture, but contracts for the sale of such articles, to be delivered across state lines, and the negotiations and bids preliminary to the making of such contracts; all of which are interstate commerce. The court said:

"If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute."

The defendants in error rely upon the case of *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325. That case arose upon a bill in equity filed by the United States under the anti-trust act to enjoin the defendants from continuing a combination which comprised substantially all the sugar refineries of the country for refining raw sugar. The bill alleged that the American Sugar-Refining Company

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had purchased the stock of four other sugar-refining companies with shares of its own, and that thereby it acquired almost the complete control of the manufacture of refined sugar in the United States. It was the object of the suit to cancel the agreements of purchase, to cause the redelivery of the stock to the former owners thereof, and to enjoin the further performance of the agreement. The court denied the relief which was prayed for, and held that the combination was not within the prohibition of the statute for the reason that the agreement related only to the manufacture of refined sugar, and not to its sale. The chief justice, in delivering the opinion of the court, said:

"Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly wherever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce. * * * The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state, and belongs to commerce."

The chief justice proceeded to say, further:

"What the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations, but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. * * * There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected, was not enough to entitle complainants to a decree."

The purport of this language of the court is to mark a distinction between a restraint upon manufacturing and a restraint upon interstate commerce in a manufactured article, and to hold that the power of congress to regulate commerce extends only to the latter. If the defendants in that case had combined for the purpose of not only regulating the manufacture of refined sugar, but the price at which it should be furnished to purchasers in other states, a different case might have been presented. There was nothing in the case as it was presented to show that the combination contem-

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plated a regulation of prices of merchandise which was to enter into interstate commerce, or a restraint of the trade in merchandise in such commerce. There was before the court only a combination to manufacture, which might or might not result in an increase of prices, and the court held, therefore, that commerce was only indirectly affected. Mr. Justice Peckham, in delivering the opinion of the court in the Addyston Pipe & Steel Co. Case, said:

"It is the sale and delivery of a certain kind and quality of pipe, and not the manufacture, which is the material portion of the contract, and a sale for delivery beyond the state makes the transaction a part of interstate commerce,"

—And, distinguishing that case from the E. C. Knight Co. Case, said, of the combination in the latter case, that its direct purpose was the control of the manufacture of sugar; and added:

"There was no combination or agreement in terms regarding the future disposition of the manufactured article, nothing looking to a transaction in the nature of interstate commerce."

In these words the court marked the limit of the doctrine of the E. C. Knight Co. Case. The plain intimation from the language of the court is that, if there had been in that case a combination or agreement in terms regarding the future disposition of the manufactured article across state lines, there would have been added the essential element to make it a combination affecting interstate commerce.

The ground upon which the court held that the combination of manufacturers in the Addyston Pipe & Steel Co. Case restrained interstate commerce was the fact that it was made in contemplation of the transaction of future business between citizens of different states and the negotiation of sales, to be made in one state, of goods to be delivered therein from another. While there was in that case no particular contract for furnishing pipe or fixing its price in the contemplation of the parties to the combination at the time when it was made, the court referred to the fact that it was the purpose of the combination to abolish all competition, and said:

"The direct and immediate result of the combination was, therefore, necessarily a restraint upon interstate commerce in respect of articles manufac- [126] tured by any of the parties to it, to be transported beyond the state in which they were made."

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The present case differs in important aspects from both the E. C. Knight Co. Case and the Addyston Pipe & Steel Co. Case. It occupies a ground intermediate between. The combination which it presents is more than a mere combination to manufacture, such as was before the court in the E. C. Knight Co. Case, and it lacks some of the features of the Addyston Pipe & Steel Co. Case, in that it contains no express provision for the transaction of business across state lines; it does not by its terms refer to the sale or delivery of shingles elsewhere than in the state of Washington. But can it be said that such sales and delivery were not within its contemplation, and are not directly affected by it? The defendants in error were engaged in manufacturing a product of which, as they well knew, more than 80 per cent. was to be sold, delivered, and used in states other than that of its manufacture. They were in the business of selling and delivering shingles to purchasers in other states. In fixing a list of prices they fixed it not alone for domestic trade, but for external commerce as well. The inevitable result of the combination is to enhance the price and restrain the trade of shingles in all the states. In the E. C. Knight Co. Case it was held that a monopoly to manufacture did not necessarily affect interstate commerce. The reason for so holding is apparent. From the creation of a monopoly to manufacture, it does not necessarily follow that interstate commerce in the monopolized article will in any degree be interfered with. The total production of the manufactured article and its price may, notwithstanding the monopoly, remain unaffected. In that case it was said, "There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce." But this cannot be said of a combination of manufacturers in one state who agree to arbitrarily increase the price and diminish the total output of a manufactured product which is made only in that state, but which is principally bought and used in other states. The intention to put a restraint upon interstate commerce in such a case is evident, and the restraint is not indirect, but direct, and it is the necessary and inevitable result of the combination.

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We do not think that the act contemplates that the combination therein made unlawful must be one which shall by its terms refer to interstate commerce. It is enough if its purpose and effect are necessarily to restrain interstate trade. If it were otherwise, all combinations in restraint of interstate trade might be so expressed in words as to avoid the statute. The true test would seem to be, not what the agreement professes, but what it accomplishes. This combination must be dealt with in view of the known facts which surrounded it when it was formed, and which still attend it. It is impossible that the parties to it had in view only domestic trade. They must have had in contemplation the market which they had theretofore had, and which they would continue to have, and which, as they well knew, was principally without the limits of their own state. It is immaterial that all the parties to the agreement were residents of the same state. It is not the place where the parties reside that distinguishes the combination, and lends to it the features of a combination in restraint of interstate trade. A case in point is *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610, recently decided by the circuit court of appeals for the Sixth circuit, in which the court held illegal under the anti-trust law, both as in restraint of interstate commerce and as tending to create a monopoly, a combination between a fuel company, a corporation of the state of West Virginia, and 14 corporations, persons, and firms of that state, who were independently engaged in producing coal and coke in a district on the line of a railroad. The combination stipulated that the company was to handle for a term of years the entire output of the members of the association, which was to be shipped to the western market over said road, and that it should sell the product of no competing mines, and it provided that a minimum price for the sale of the coal and coke should be fixed from time to time by a committee of the association, which price the fuel company agreed to pay, and in addition thereto agreed to obtain as large a profit as possible, and to account to the association for all thereof above a fixed sum per ton, which it was to retain as its compensation. We have not over-

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looked certain expressions of the court in the *E. C. Knight Co. Case*, where it was said that congress did not attempt, by the act of July 2, 1890, "to limit and restrict the rights of corporations created by the states, or the citizens of the states, in the acquisition, control, or disposition of property, or to regulate or prescribe the price or prices at which such property or the products thereof should be sold"; and where it was further said that contracts "to raise or lower prices or wages might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy." We think the court, in using this language, had in view combinations to raise prices which might be made without special reference to interstate trade, and which would only indirectly affect it. The combination in the case before the court is more than a combination to regulate prices; it is a combination to control the production of a manufactured article more than four-fifths of which is made for interstate trade, and to diminish competition in its production, as well as to advance its price. These features, we think, determine its object, and bring it under the condemnation of the law. The plaintiff in error is in the business of buying the manufactured article in the state where it is manufactured, and selling it to purchasers in other states. The acts charged against the defendants in error interfere with his "contracts to buy, sell, or exchange goods to be transported among the several states,"—contracts which are made and negotiated between the plaintiff in error and his customers in various states,—and the acts of the defendants are in restraint of the interstate commerce in which he is engaged. We think the complaint states a cause of action. We find no error in the ruling of the circuit court in denying the motion of the plaintiff in error for an order granting the default of all the defendants in error except *E. J. McNeeley* and *Victor H. Beckman*, [128] and granting *Bates & Murray* leave to withdraw their general appearance entered on behalf of all of the defendants in error, and to so amend

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the same as to make said appearance for and on behalf of McNeeley and Beckman only.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings not inconsistent with the foregoing views.

[922] GENERAL ELECTRIC CO. v. WISE.

(Circuit Court, N. D. New York. January 17, 1903.)

[119 Fed., 922.]

PATENTS—INJUNCTION AGAINST INFRINGEMENT—DEFENSES.—That a defendant is able to respond in damages is no defense to an application for an injunction against infringement of a patent. If the patent is valid, the owner has the absolute right to be protected in the exclusive use of the invention which the law secures to him during the term of the patent.^a

SAME—VIOLATION OF ANTI-TRUST LAW.—That a complainant is a member of a combination in violation of the anti-trust law of July 2, 1890 [U. S. Comp. St. 1901, p. 3200], does not give third persons the right to infringe a patent of which complainant is owner, nor preclude complainant from maintaining a suit in equity to enjoin such infringement.

SAME—ANTICIPATION—PRIOR UNSUCCESSFUL DEVICES.—A patent for an invention which successfully accomplishes a useful result is not void, for anticipation or prior use, because of a prior device, however similar in combination or close in resemblance to that of the patent, where such prior device was not operative, and failed to produce the result sought, and which is produced by the device of the patent.

SAME—INFRINGEMENT—INCANDESCENT LAMP SOCKET.—The device of the Tournier patent, No. 559232, for an incandescent lamp socket, was not anticipated by either the Weston socket or the Westinghouse push button socket, both of which failed to accomplish the result sought, and attained by the device of the patent. Claims 1, 2, 3, and 4 construed, and *held* valid and infringing, on a motion for a preliminary injunction.

In Equity. This is a motion in the above-entitled cause for a preliminary injunction restraining the defendant, his agents and servants, from manufacturing and selling certain

^a See Patents, vol. 38, Cent. Dig. § 495.

^b Syllabus copyrighted, 1903, by West Publishing Co.

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electrical apparatus (sockets for incandescent lamps) alleged to be an infringement of the Tournier patent (letters patent No. 559232), particularly claims 1, 2, 3, and 4 thereof,—a structure or invention alleged to be indispensable in the art of electric lighting.

Samuel Owen Edmonds, for complainant.

Alfred Wilkinson (*William Kernan*, of counsel), for defendant.

RAY, District Judge.

The complainant's claim is: That prior to April 28, 1896, Julius C. Tournier, a citizen of the state of New York, residing at Schenectady, was the original, first, and sole inventor of certain new and useful improvements in sockets for incandescent lamps, fully described in the letters patent, No. 559232, and which had not been used by others in this country before his invention or discovery thereof, and which had not been abandoned or patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, or more than two years prior to his application for said letters patent, and which were not, prior to his said application, in public use or on sale in this or any other country for more than two years. That all lawful conditions having been complied with, on the 28th day of April, 1896, letters patent, in due form, were duly issued therefor to the said Tournier; [923] complainant, General Electric Company, being the assignee of said Tournier. That by virtue of such patent and assignment the complainant became and is vested with and possessed of the full and entire right, title, and interest in and to said letters patent, and all rights thereunder, and was in the full possession and enjoyment of same up to February, 1899. That the complainant is a large manufacturing company, engaged in manufacturing and putting sockets for incandescent lamps, employing and containing such invention, on the market and in the trade, and that same are being generally used, and that such sockets so made, sold, and delivered have been duly marked "Patented," and that complainant has invested large capital in the business, and been to great expense and

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trouble in establishing the business, and that such sockets are in great demand, and complainant will reap great benefits if the alleged infringement by the defendant is enjoined, and suffer great loss if an injunction is not granted. That in the spring of 1899, the Anchor Electric Company undertook to and did infringe said letters patent. That this complainant brought suit against said company for said infringement in the United States circuit court for the Southern district of New York, and that an answer was filed alleging the invalidity of said patent by reason of anticipation in the prior art, and that the production of such structure did not involve the exercise of invention, and also denying that the sockets made and sold by said Anchor Electric Company constituted an infringement. That proofs were taken, the action tried and duly submitted, and a decree duly made and entered fully establishing the validity of such patent. The final decree was made January 24, 1902. Another suit and decree of similar or the same import against New England Electric Company are also alleged. It is then alleged that the defendant, well knowing all such facts, without license or allowance and against the will of the complainant, has made and sold, and is making and selling, or causing to be made, used, and sold, sockets for incandescent lamps, employing and containing the said invention, and particularly those set forth in claims 1, 2, 3, and 4 of said letters patent, and is threatening to continue such infringement; that said defendant has been notified of such infringement; and that his continuance of such acts encourage others to infringe likewise.

The defendant claims that this invention was old,—prior invention,—and relies on the Weston socket and the Westinghouse push button socket, and says he has not infringed, and that his block differs more from Tournier's than Tournier's does from Weston's. The defendant then alleges that the complainant does not come into court with "clean hands"; that it and all other important socket manufacturers in the country organized an illegal association three or more years ago, by the terms of which they bound themselves to raise the price of sockets, and not to sell at a lower price than agreed, in direct opposition to the anti-trust law of July

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2, 1890 (26 Stat. 209 [U. S. Comp. St. 1901, p. 3200])). By implication, rather than directly, it charges collusion between the complainant and Anchor Electric Company in the action referred to, and finally says no injunction should be granted, because the defendant is a leading manufacturer of Watertown, N. Y., amply able to respond in damages, and that the com- [924] plainant should resort to that remedy even if this court finds an infringement.

No time will be used in answering this suggestion, except to say that, if the complainant's letters patent are valid, it is entitled to protection by injunction against all the world. No other person or company can use its property of this description without its consent, and relegate it to an action for damages. If this patent is valid, the complainant has the absolute right, under the laws of our country, to the use of the patent, and to designate the parties upon whom it will confer the right to use it. Again, in such a case, an action for damages does not afford an ample or a full and complete remedy. Such a remedy is inadequate. In a sense, the granting of a patent confers a monopoly on the inventor or owner of such patent, but such a monopoly is granted in the interest of the public as well as of the grantee of the patent, and is an encouragement to the development of inventive skill and genius. The patent laws of the United States, while sometimes abused or perverted, have had much to do with the growth and prosperity of our country, and have added much to our material and intellectual development. Ultimately, these inventions are surrendered to the public, and it is only just that for a time the inventor reap the rewards of study and industry. *Grant v. Raymond*, 6 Pet. 218, 241, 8 L. Ed. 376; *Bement v. Harrow Co.*, 186 U. S. 88, 89, 22 Sup. Ct. 747, 46 L. Ed. 1058. The cry of monopoly, therefore, has no place in the discussion of the question of infringement or priority of invention. It is difficult to understand how or why a violation of the Sherman anti-trust law by this complainant, if there has been such a violation, confers any right on the defendant to infringe this patent. That act points out the penalties for its violation, and it is not understood that such law denies the grantees of patents the protection of the law because they may be violating

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some statute. However that may be the evidence falls far short of establishing such a violation by this complainant. The testimony on that subject is squarely contradicted. An individual cannot confiscate the property or property right of a corporation on the ground it has violated that act. *Soda Fountain Co. v. Green* (C. C.) 69 Fed. 333; *Columbia Wire Co. v. Freeman Wire Co.* (C. C.) 71 Fed. 302; *Bement v. Harrow Co.*, 186 U. S. 70, 88-91, 22 Sup. Ct. 747, 46 L. Ed. 1058. *Harrow Co. v. Quick* (C. C.) 67 Fed. 131, cannot be accepted as authority on this question.

We come then to the consideration of the questions whether this Tournier patent, No. 559,232, issued April 28, 1896, is a new and valid invention, and whether the defendant has infringed and is infringing same.

Claims 1, 2, 3, and 4 of the said patent, now particularly in question, are as follows:

"(1) In an incandescent lamp socket, an insulating block, circuit terminals, and a circuit-controlling key, with a metallic tip and operating spring mounted thereon, in combination with a metallic socket mounted on the insulating block; the metallic tip of the controlling key being adapted to make contact with the shell and close the circuit.

"(2) In an incandescent lamp socket, as a new article of manufacture, an insulating block, formed with passages in its edges for the circuit wires, a [925] transverse passageway for the insertion of a controlling circuit key shaft, its bearings, and a controlling spring, a cavity at one end for the location of a rotary metallic tip of the key shaft, and a cavity at the other end for the location of one of the binding screws and brackets, a cavity at one side of the block for the location of the other binding screw and bracket, and a contact arm as herein set forth.

"(3) In an incandescent lamp socket, an insulating block, formed with a transverse cavity, a rotary circuit-controlling key, and a spring and contact tip located in this cavity, binding screws located in cavities in the insulating block, one connected with the key shaft and the other with a metallic contact arm projecting over the top of the block, and a shell or socket mounted on the top of a block, and adapted to complete the circuit with a lamp by contact of the contact tip therewith.

"(4) In a socket for incandescent lamps, the combination with the insulating base thereof and a key having a contact tip of a lamp-socket cylindrical shell mounted on one end of said base, and so arranged in relation to the key tip that the latter contacts with the lamp-socket cylindrical shell to close the circuit, as set forth."

In *General Electric Co. v. Anchor Electric Co.* (and Henry G. Issertel as agent and manager of said company), reported (C. C.) 106 Fed. 503, the validity of this patent,—particularly of claims 1, 2, 3, and 4, above quoted, and also

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claim 9, was directly in issue; and it was held by Shipman, Circuit Judge, after full and careful consideration:

"The Tournier patent, No. 559232, for a socket for incandescent lamps, the base of which consists of a substantial block of porcelain or other insulating material, in which the contact key and circuit terminals are incased, covers a device which, as a complete structure, was not anticipated, and, in view of its immediate general adoption and commercial success, cannot be denied patentable invention. Claims 1, 2, 3, and 4 construed, and held infringed. Claim 9, which is limited to an insulating ring, used between the outer shell and the socket, held void for lack of invention, in view of the prior art."

In that decision, as far as it covers the precise questions now presented, this court fully concurs. It is not necessary to travel over the same ground, and present the same facts and reasoning in different language. But the respondent here, James B. Wise, as he alleges, raises new questions, and presents new evidence, upon which this court is asked to find and hold that this invention, covered by the claims quoted, was anticipated and not patentable, and, failing here, claims the defendant's socket is as much or more a new invention as the complainant's, and that same is so widely different as not to constitute an infringement. The defendant says:

"We oppose this motion on new evidence of the highest importance, and offer entirely new defenses: First. On the Weston socket, having a cylindrical block of insulation, identical in every essential with Tournier's, for it has the transverse passageway, the outside cavities, and the wire grooves or passages in its edges. Second. On the Westinghouse push button socket, in public use and on sale in 1893 and before, which shows a porcelain block of similar construction, having a transverse passageway to receive and to protect the switch mechanism."

It is not discovered from the record that Judge Shipman had these two sockets, or a description of them, before him when he passed on the question of anticipation or prior invention and use. This alleged new evidence will be considered on the theory that it was not presented to the court on the trial of the Anchor Electric Co. Case, and might have changed the result there, and may change the result here from [926] what it necessarily would be, should this court follow the decision of Judge Shipman.

Two or more persons may use the same material, existing in precisely or substantially the same form, experimenting and making combinations, and having in mind the construc-

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tion of a new and a useful invention that will produce a given result. The one or ones who fail invent nothing, but the one who succeeds may have invented a patentable thing; and, if a patent is granted, he is entitled to its protection and benefits. Those who failed, or others, cannot, by taking the same materials and making substantially the same combinations, varying the form or arrangement, or both, in nonessentials, but aiming at and producing the same results, claim either priority of invention, prior use, or new invention. Such facts will not defend the charge of infringement. And even if in such experimentation certain imperfect results were obtained, that fact does not establish priority of invention. "If the patented invention is not operative, it cannot be infringed by one that is." *Royer v. Coupe* (C. C.) 29 Fed. 358, 39 O. G. 239. It would seem to follow that however close the resemblance between some prior alleged invention, even when put in actual use, and the patented invention, if such alleged prior invention was not operative, and failed to produce the beneficial results sought and produced by the patent, it could not constitute prior invention. In such case the patented invention cannot be regarded as old.

In *General Electric Co. v. Anchor Electric Co.*, supra, Judge Shipman says:

"The insulating block of the patent, as constructed and arranged to become the receptacle of the various metallic parts, was a novelty, and in its peculiar characteristics it had no predecessor."

It is now insisted that the Weston socket and the Westinghouse push button socket are each substantially identical with the Tournier socket, and that therefore the Tournier insulating block had not one, but two, predecessors. A careful examination of both, and a comparison of the Tournier block with the Weston block, not only fail to disclose identity, but even similarity, when we consider the purposes for which devised, and the ends to be accomplished. Both are, in general form, cylindrical. Each has a transverse passageway, but these are neither identical, nor, mechanically speaking, similar. The differences in the two are marked and well defined, and absolutely essential differences. They are so marked that it does not occur to the observer that the designer of the Tournier block had the Weston block before

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him, or in mind, when planning his. In the Tournier block the transverse passageway gives neither ingress on the one side, nor egress on the other, to its full depth. At one side this passageway is so widened as to form a chamber on either side of the main passageway, while at the other side a part of the block is entirely cut away for about one-third the diameter of the block, and to a depth within one-eighth or one-fourth of an inch from the bottom of the transverse passageway. Upon one side a recess is cut, which reaches to within about one-eighth of an inch of the passage referred to. There are other peculiarities, not necessary to describe, but all these peculiarities have their necessary uses in the assembled socket. In the Weston [927] block, which was of wood, the transverse passageway extends from circumference to circumference unbroken, is much wider, is of uniform width from circumference to circumference and of uniform depth, giving ingress and egress to its full depth, and on one side is cut through to the bottom. Upon the outside of the cylinder we find no less than eight grooves and recesses vertical and diagonal for the arrangement and application of the electrical appliances, none of which are found in the Tournier block. When we come to consider the mode of using these blocks, the ideas of means of application and use, and the results, we find that the functions are not the same, the modes of operation are radically unlike, the results not the same, and the ideas of means for the accomplishment of satisfactory results are radically different, or at least radically defective, in the assembled Weston socket. The Weston socket was not satisfactory or even safe. The Tournier device was carefully and skillfully wrought out by a change in the character of the insulating base, as well as by the modes of working the same, and also in many minor details and appliances, all brought into harmony and harmonious action, and producing satisfactory results, at which many had aimed, but which all had failed to accomplish. It is impossible to find that the Weston socket was, in a legal sense, as applied in these cases, the predecessor of the Tournier socket.

Coming to the consideration of the Westinghouse push

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button socket, we find far less resemblance and similarity. It is not necessary to go into detail. In both the Star and Weston sockets, the metallic switch mechanism, which is in the circuit where the current of electricity is being fed to the lamp, is arranged in a cavity or a passageway on the underside of the block, and consequently there is no solid insulation between these electrified parts and the metallic supporting cap of the socket. The result of this, or one result, is the tendency to short-circuiting and burning out, and the resulting fire hazard. In the Tournier socket, the metallic switch mechanism is arranged in a passageway on the upper side of the block, and we have a solid wall of insulation interposed between these electrified parts and the supporting cap of the socket. Short-circuits and burning out are thus precluded between such parts and the cap. In the Tournier socket, we find the contact key and circuit terminals encased within the base, and accidental contact with the exterior metallic shell is thus prevented. In the Weston socket, one of the terminals—one of the parallel contact strips on the block (and this corresponds to the screw shell element)—is always in the circuit and electrified, whether the lamp is in place and the current turned on or not. Here is found, again, the evil of short-circuiting, with outside metallic bodies, and also a liability to accidental shock when handling the socket and when replacing or removing the lamp. With the Tournier socket, all this is remedied, as the situation is the reverse. Again, in the Tournier structure we find the threaded shell disconnected from the circuit except when the lamp is in place or the key closed. To bring about these results, necessary to the success of the art, required inventive skill. The Tournier structure accomplished what all others had failed to bring about, by new ideas of means, by the use of new means, or, to some [928] extent, old appliances improved, applied, and combined in a new and an effective and beneficial way.

We come, then, to consider the alleged infringement. Each and every essential element of the Tournier patent, as described or mentioned in the claims quoted, or its exact equivalent, is used by the defendant in what we will term the "Wise

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Socket." Placing the various appliances, making up the assembled sockets, side by side, and then taking the assembled sockets as a whole, we find that there is no substantial difference, except in the mere form of two or three of the parts. In short, the Wise socket is a copy of the Tournier. The compared sockets perform the same functions by the same modes of operation. The effects are the same; the modes of operation are the same, substantially; and the same is true of the means employed. In some respects we find variations in size, shape, and arrangement, but these are evidently studied, not for the sake of improvement, but to avoid the charge of infringement. The socket of the Anchor Electric Co. held to be an infringement, and therefore enjoined (106 Fed. 503), differs but slightly from the Wise socket, here in question. The defendant here, in some respects, has varied from the Anchor Electric and New England infringements, but in so doing has made the similarity of his socket to the Tournier patent the more apparent. In some respects he has varied the form of the insulating block by changing the location, size, and shape of certain cavities and grooves; but all these changes are immaterial, as they do not change the principles of operation, the means, or the results, and the claims of the Tournier patent (referred to and here in question) do not confine the complainant to any precise form or size. The combinations in the assembled socket do not present any substantially different combination. As stated, the combinations are substantially identical. So far as there has been a substitution of elements, they were well-known equivalents. The defendant has produced this Wise socket extensively and secretly. He claims the right to continue its manufacture and sale. Unless enjoined, he will do this, and most seriously injure the complainant. This injury cannot be measured satisfactorily by any judgment for damages, even if the defendant shall be found responsible at the end of the protracted litigations sure to follow a denial of this application.

The conclusion is that, until the trial and determination of this action, the defendant should be enjoined as prayed. It is so ordered.

Syllabus.

[721] UNITED STATES *v.* NORTHERN SECURITIES CO. ET AL.^a

(Circuit Court, D. Minnesota, Third Division. April 9, 1903.)

[120 Fed., 721.]

MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—CONSTRUCTION OF ANTI-TRUST LAW.—The generality of the language used in the anti-trust act of 1890 (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), declaring illegal "every contract, combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations," indicates the purpose of Congress to include in the prohibition every combination which directly and substantially restricts interstate commerce, whatever its form.^b

SAME—APPLICATION OF ACT TO INTERSTATE CARRIERS.—The anti-trust act (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]) applies to interstate carriers of freight and passengers, and any contract or combination which directly and substantially restricts the right of such a carrier to fix its own rates, independently of its natural competitors, places a direct restraint upon interstate commerce, in that it tends to prevent competition, and is in violation of the act, whether the rates actually fixed be reasonable or unreasonable.

SAME—CORPORATION TO ACQUIRE STOCK OF COMPETING RAILROADS—LEGALITY.—The real control of a corporation is in its stockholders, who have the power to determine all important corporate acts and policies, and any contract or combination by which a majority of the stock of two railroad companies owning and operating parallel and competing interstate lines of road is transferred to a corporation organized for the purpose of holding and voting the same, and receiving the dividends thereon, to be divided pro rata among the stockholders of the two companies so transferring their stock, directly and substantially restricts interstate trade and commerce, and is in violation of the anti-trust act (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), since it destroys any motive for competition between the two roads; and it is immaterial that each company has its own board of directors, which nominally directs its operations and fixes its rates.

CORPORATIONS—POWERS—NEW JERSEY STATUTES.—The language of the New Jersey enabling act (Laws 1899, p. 473), authorizing the organization of corporations "for any lawful purpose," imposes a limitation upon the powers of any corporation organized thereunder, however broad may be the terms of its articles of incorporation.

^a Affirmed by Supreme Court (193 U. S., 197). See p. 338.

^b Syllabus copyrighted, 1903, by West Publishing Co.

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SAME—INTERSTATE COMMERCE.—A state cannot invest a corporation organized under its laws with the power to do acts in the corporate name which would operate to restrain interstate commerce.

CONSTITUTIONAL LAW—RIGHT OF PRIVATE CONTRACT—LIMITATION BY INTERSTATE COMMERCE CLAUSE.—The constitutional guaranty of liberty to the individual to enter into private contracts is limited to some extent by the commerce clause of the Constitution, and Congress may, in the exercise of the power conferred by such clause, prohibit private contracts which operate to directly and substantially restrain interstate commerce.

MONOPOLIES—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—SUIT TO ENJOIN.—The fact that the purpose of an illegal combination between stockholders of two railroad companies operating parallel and competing interstate lines, to secure unity of interest and control of such companies, and to prevent competition, has been accomplished by the formation of a corporation which has acquired the ownership of a majority of the stock of each of the companies, cannot be urged to defeat a suit by the United States to restrain the exercise of the power so illegally acquired [722] by the corporation through such combination, as imposing a restraint upon interstate commerce in violation of the anti-trust law (Act July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]).

SAME—DEFENSES—QUESTIONS OF PUBLIC POLICY.—Where the effect of a combination is to directly prevent competition between two parallel and naturally competing lines of railroad engaged in interstate business, it is in restraint of interstate commerce, and a violation of the anti-trust act (Act July 2, 1890, 26 Stat. 209, see 647 [U. S. Comp. St. 1901, p. 3200]), and the court, in a suit to enjoin it as such, cannot consider the question whether the combination may not be of greater benefit to the public than competition would be; that being a question of public policy, to be determined by Congress.

In Equity.

Philander C. Knox, Attorney General, *D. T. Watson*, Special Counsel, *James M. Beck* and *W. A. Day*, Assistant Attorneys General, and *John M. Freeman*, for the United States.

George B. Young and *John W. Griggs*, for the Northern Securities Company.

George B. Young, for *James J. Hill*, *William P. Clough*, *D. Willis James*, *John S. Kennedy*, and *George F. Baker*.

M. D. Grover, for the Great Northern Railway Company.

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C. W. Bunn, for the Northern Pacific Railway Company.

Francis Lynde Stetson and *David Willcox*, for defendants
Morgan, *Bacon*, and *Lamont*.

Before CALDWELL, SANBORN, THAYER, and VANDEVANTER,
Circuit Judges.

THAYER, Circuit Judge.

This is a bill, exhibited by the United States, to restrain the violation of an act of Congress approved July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which is commonly termed the "Sherman Anti-Trust Act." The case was heard before a Circuit Court composed of the four Circuit Judges of the Eighth Circuit, pursuant to the provisions of a recent act of Congress, approved February 11, 1903, which requires such cases to be heard "before not less than three of the Circuit Judges" of the Circuit where the suit is brought, when the Attorney General files with the clerk of the court wherein the case is pending, a certificate that it is one of "general public importance." Such a certificate has been filed, and in accordance with the mandate of the statute the case "has been given precedence over others and in every way expedited."

From admissions made by the pleadings, as well as from much oral testimony, we reach the following conclusions as respects matters of fact:

Two of the defendants, namely, the Northern Pacific Railway Company and the Great Northern Railway Company, are the owners, respectively, of lines of railroad which extend from the cities of Duluth, St. Paul, and Minneapolis, in the state of Minnesota; thence across the continent to Puget Sound. These roads are, and in public estimation have ever been regarded as, parallel and competing lines. For some years, at least, after they were built, they competed with each other actively for transcontinental and interstate traffic.

[723] In the spring of the year 1901 they united in purchasing about 98 per cent. of the entire capital stock of the Chicago, Burlington & Quincy Railway Company, and be-

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came joint sureties for the payment of bonds of the last-named company, whereby the purchase was accomplished, which were to run 20 years, and bear 4 per cent. interest per annum. The amount of stock so acquired was of the par value of about \$107,000,000, and, as it was purchased at the rate of \$200 per share, the bonded indebtedness of the two companies was thus increased to the extent of \$200,000,000.

Subsequent to the acquisition of the stock of the Burlington Company, and in the summer of the year 1901, certain large and influential stockholders of the Northern Pacific and Great Northern Companies, who had practical control of the two roads, and who have been made parties defendant to the present bill, acting in concert with each other, conceived the design of placing a very large majority of the stock of both of the last-named companies in the hands of a single owner. To this end these stockholders arranged and agreed with each other to procure and cause the formation of a corporation under the laws of the state of New Jersey, which latter company, when organized, should buy all or at least the greater part of the stock of the Northern Pacific and Great Northern Companies. The individuals who conceived and promoted this plan agreed with each other to exchange their respective holdings of stock in the last-named railroad companies for the stock of the New Jersey company, when the same should be fully organized, and to use their influence to induce other stockholders in their respective companies to do likewise, to the end that the New Jersey company might become the sole owner of the whole, or at least a major portion, of the stock of both railroad companies.

In accordance with this plan the defendant the Northern Securities Company (hereafter termed the "Securities Company") was organized under the laws of the state of New Jersey on November 13, 1901, with a capital stock of \$400,000,000, that sum being the exact amount required to purchase the total stock of the two railroad companies at the price agreed to be paid therefor. When the Securities Company was organized, it assented to and became a party to the scheme that had been devised by its promoters before it became a legal entity.

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Very shortly after its organization the Securities Company acquired a large majority of all the stock of the Northern Pacific Company at the rate of \$115 per share, paying therefor in its own stock at par. At the same time it acquired about 300,000 shares of the stock of the Great Northern Company from those stockholders of that company who had been instrumental in organizing the Securities Company, paying therefor at the rate of \$180 per share, and using its own stock at par to make the purchase.

The Securities Company subsequently made further purchases of stock of the Great Northern Company at the same rate, and in about three months had acquired stock of the latter company, amounting at par to about \$95,000,000, using for that purpose its own stock to the amount of about \$171,000,000. The Securities Company was enabled to make the subsequent purchase of stock from stockholders [724] of the Great Northern Company not immediately concerned in the organization of the Securities Company by the advice, procurement, and persuasion of those stockholders of the Great Northern Company who had been instrumental in organizing the Securities Company, and had exchanged their own stock for stock in that company shortly after its organization. At the present time the Securities Company is the owner of about 96 per cent. of all the stock of the Northern Pacific Company, and the owner of about 76 per cent. of all the stock of the Great Northern Company.

The scheme which was thus devised and consummated led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies; and, according to the familiar rule that every one is presumed to intend what is the necessary consequence of his own acts when done willfully and deliberately, we must conclude that those who conceived and executed the plan aforesaid intended, among other things, to accomplish these objects.

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The general question of law arising upon this state of facts is whether such a combination of interests as that above described falls within the inhibition of the anti-trust act or is beyond its reach. The act brands as illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations." Learned counsel on both sides have commented on the general language of the act, doing so, of course, for a different purpose, and the generality of the language employed is, in our judgment, of great significance. It indicates, we think, that Congress, being unable to foresee and describe all the plans that might be formed and all the expedients that might be resorted to to place restraints on interstate trade or commerce, deliberately employed words of such general import as, in its opinion, would comprehend every scheme that might be devised to accomplish that end.

What is commonly termed a "trust" was a species of combination organized by individuals or corporations for the purpose of monopolizing the manufacture of or traffic in various articles and commodities, which was well known and fully understood when the anti-trust act was approved. Combinations in that form were accordingly prohibited; but Congress, evidently anticipating that a combination might be otherwise formed, was careful to declare that a combination in any other form, if in restraint of interstate trade or commerce—that is, if it directly occasioned or effected such restraint—should likewise be deemed illegal.

Moreover, in cases arising under the act, it has been held by the highest judicial authority in the nation, and its opinion has been reiterated in no uncertain tone, that the act applies to interstate carriers of freight and passengers as well as to all other persons, natural or artificial; that the words "in restraint of trade or commerce" do not [725] mean in unreasonable or partial restraint of trade or commerce, but any direct restraint thereof; that an agreement between competing railroads, which requires them to act in concert in fixing the rate for the carriage of passengers or freight over their respective lines from one state to another, and which, by that means, restricts temporarily the right of

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any one of such carriers to name such rates for the carriage of such freight or passengers over its road as it pleases, is a contract in direct restraint of commerce within the meaning of the act, in that it tends to prevent competition; that it matters not whether, while acting under such a contract, the rate fixed is reasonable or unreasonable, the vice of such a contract or combination being that it confers the power to establish unreasonable rates, and directly restrains commerce by placing obstacles in the way of free and unrestricted competition between carriers who are natural rivals for patronage; and, finally, that Congress has the power, under the grant of authority contained in the federal Constitution, to regulate commerce, to say that no contract or combination shall be legal which shall restrain interstate trade or commerce by shutting off the operation of the general law of competition. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

Taking the foregoing propositions for granted, because they have been decided by a court whose authority is controlling, it is almost too plain for argument that the defendants would have violated the anti-trust act if they had done, through the agency of natural persons, what they have accomplished through an artificial person of their own creation. That is to say, if the same individuals who promoted the Securities Company, in pursuance of a previous understanding or agreement so to do, had transferred their stock in the two railroad companies to a third party or parties, and had agreed to induce other shareholders to do likewise, until a majority of the stock of both companies had been vested in a single individual or association of individuals, and had empowered the holder or holders to vote the stock as their own, receive all the dividends thereon, and prorate or divide them among all the shareholders of the two companies who had transferred their stock—the result would have been a combination in direct restraint of interstate commerce, because it would have placed in the hands of a small coterie of men the power to suppress competition between two com-

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peting interstate carriers, whose lines are practically parallel.

It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of the majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and that their policy is controlled by those who own the majority of their stock. Indeed, one of the favorite methods in these days, and about the only method, of obtaining control of a corporation, is to purchase the greater part of its stock. It was the method pursued by the Northern Pacific and Great Northern Companies to obtain control of the Chicago, Burlington & Quincy Railroad; and, so [726] long as directors are chosen by stockholders, the latter will necessarily dominate the former, and in a real sense determine all important corporate acts.

The fact that the ownership of a majority of the capital stock of a corporation gives one the mastery and control of the corporation was distinctly recognized and declared in *Pearsall v. Great Northern Railway*, 161 U. S. 646, 671, 16 Sup. Ct. 705, 710, 40 L. Ed. 838. The same fact has been recognized and declared by other courts. *Pennsylvania R. Co. v. Commonwealth* (Pa.) 7 Atl. 368, 371; *Farmers' Loan & Trust Co. v. New York & Northern Railway Co.*, 150 N. Y. 410, 425, 44 N. E. 1043, 34 L. R. A. 76; *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 802, 8 L. R. A. 497, 17 Am. St. Rep. 319. In opposition to this view counsel cite *Pullman Car Co. v. Missouri Pacific Co.*, 115 U. S. 587, 596, 6 Sup. Ct. 194, 29 L. Ed. 499, but in that case the meaning of the word "controlled," as used in a private contract, was the point under consideration, and what was said on the subject cannot be held applicable to cases arising under the anti-trust act, when the point involved is whether the ownership of all of the stock of two competing and parallel railroads vests the owner thereof with the power to suppress competition between such roads. We entertain no doubt that it does. Indeed, we regard the suppression of competition, and to that extent a restraint of commerce, as the natural and inevitable result of such ownership.

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What has been done through the organization of the Securities Company accomplishes the object which Congress has denounced as illegal more effectually, perhaps, than such a combination as is last supposed. That is to say, by what has been done the power has been acquired (and provision made for maintaining it) to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad. Competition, we think, would not be more effectually restrained than it now is under and by force of the existing arrangement if the two railroad companies were consolidated under a single charter.

It is manifest, therefore, that the New Jersey charter is about the only shield which the defendants can interpose between themselves and the law. The reasoning which led to the acquisition of that charter would seem to have been that while, as individuals, the promoters could not, by agreement between themselves, place the majority of the stock of the two competing and parallel railroads in the hands of a single person or a few persons, giving him or them the power to operate the roads in harmony, and stifle competition, yet that the same persons might create a purely fictitious person termed a corporation, which could neither think nor act except as they directed, and, by placing the same stock in the name of such artificial being, accomplish the same purpose. The manifest unreasonableness of such a proposition, and the grave consequences sure to follow from its approval, compel us to assume that it must be unsound, especially when we reflect that the law, as administered by courts of equity, looks always at the substance of things—at the object accomplished, whether it be lawful or unlawful—rather than upon the particular devices or means by which it has been accomplished.

[727] So far as the New Jersey charter is concerned, the question, broadly stated, which the court has to determine, is whether a charter granted by a state can be used to defeat the will of the national legislature as expressed in a law relating to interstate trade and commerce over which Congress has absolute control. Presumptively, at least, no charter granted by a state is intended by the state to have that effect or to be used for such a purpose; and in the pres-

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ent instance it is clear that the state of New Jersey did not intend to grant a charter under cover of which an object denounced by Congress as unlawful, namely, a combination conferring the power to restrain interstate commerce might be formed and maintained because the enabling act under which the Securities Company was organized expressly declares that three or more persons may avail themselves of the provisions of the act and "become a corporation for any lawful purpose." Laws N. J. 1899, p. 473. This language is not merely perfunctory. It means, obviously, that, whatever powers the incorporators saw fit to assume, they must hold and exercise for the accomplishment of lawful objects. The words in question operate, therefore, as a limitation upon all the powers enumerated in the articles of association which were filed by the promoters of the Securities Company, so that, however extensive and comprehensive these powers may seem to be, the state of New Jersey has said, "You shall not exercise them so as to set at defiance any statute lawfully enacted by the Congress of the United States, or any statute lawfully enacted by any state wherein you see fit to exercise your powers."

But aside from this view of the subject, if the state of New Jersey had undertaken to invest the incorporators of the Securities Company with the power to do acts in the corporate name which would operate to restrain interstate commerce, and for that reason could not be done by them acting as an association of individuals, then we have no doubt that such a grant would have been void under the provisions of the anti-trust act, or at least that the charter could not be permitted to stand in the way of the enforcement of that act.

The power of Congress over interstate commerce is supreme, far-reaching, and acknowledges no limitations other than such as are prescribed in the Constitution itself. *Gibbons v. Ogden*, 9 Wheat. 1, 197, 6 L. Ed. 23; *County of Mobile v. Kimball*, 102 U. S. 691, 696, 697, 26 L. Ed. 238; *Champion v. Ames* (decided Feb. 23, 1903) 23 Sup. Ct. 321, 47 L. Ed. —. No legislation on the part of a state can curtail or interfere with its exercise; and, in view of repeated decisions, no one can deny that it is a legitimate

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exercise of the power in question for Congress to say that neither natural nor artificial persons shall combine or conspire in any form whatever to place restraints on interstate trade or commerce. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136.

It is urged, however, that such a combination of adverse interests as was formed, and has been heretofore described, was lawful, and not prohibited by the anti-trust act, because such restraint upon interstate trade or commerce, if any, as it imposes, is indirect, collateral, [728] and remote, and hence that the combination is not one of that character which the Congress of the United States can lawfully forbid. The following cases are relied upon to sustain the contention: *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. It is pertinent, therefore, to inquire in what way the existing combination that has been formed does affect interstate commerce. It affects it, we think, by giving to a single corporate entity, or, more accurately, to a few men acting in concert and in its name and under cover of its charter, the power to control all the means of transportation that are owned by two competing and parallel railroads engaged in interstate commerce; in other words, the power to dictate every important act which the two companies may do, to compel them to act in harmony in establishing interstate rates for the carriage of freight and passengers, and generally to prescribe the policy which they shall pursue. It matters not, we think, through how many hands the orders come by which these aims are accomplished, or through what channels. The power was not only acquired by the combination, but it is effectually exercised, and it operates directly on interstate commerce, notwithstanding the man-

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ner of its exercise, by controlling the means of transportation, to wit, the cars, engines, and railroads by which persons and commodities are carried, as well as by fixing the price to be charged for such carriage.

The cases cited above, and on which reliance is placed to sustain the view that the restraint imposed is merely indirect, remote, incidental, or collateral, are not relevant, for, as was fully explained in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 238, 240, 243, 20 Sup. Ct. 96, 44 L. Ed. 136, one of these cases (*United States v. E. C. Knight Company*) dealt only with a combination within a state to obtain a practical monopoly of the manufacture of sugar, and it was held that the combination only related to manufacture, and not to commerce among the states or with foreign nations; that the fact that an article was manufactured for export to another state did not make it an article of interstate commerce before transportation had been begun, or necessarily subject it to federal control; and that the effect of the combination then under consideration on interstate commerce was at most only incidental and collateral. But while commenting on its previous decision in *United States v. E. C. Knight Co.*, the court took occasion to say, in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 246, 20 Sup. Ct. 96, 44 L. Ed. 136, that, when a contract is made for the sale and delivery of an article in another state, the transaction is one of interstate commerce, although the vendor has also agreed to manufacture the article so sold, and that combinations to control and monopolize such transactions would be in restraint of interstate commerce.

In the other cases (*Hopkins v. United States* and *Anderson v. United States*) it was held that the business of the members of the Kansas City Live Stock Exchange, which was under consideration by the court, was not interstate commerce and that the act did not affect them, and that, even if they were so affected, the particular agree- [729] ment which was involved did not operate as a restraint of interstate commerce.

We fail to find in either of these cases any suggestion that

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a combination such as the one in hand, the object and necessary effect of which is to give to a single person or to a coterie of persons full control of all the means of transportation owned by two competing and parallel lines of road engaged in interstate commerce, as well as the power to fix the rate for the transportation of persons and property, does not directly and immediately affect interstate commerce. No combination, as it would seem, could more immediately affect it.

Again, it is urged tentatively that, if the existing combination which the government seeks to have dissolved is held to be one in violation of the anti-trust act and unlawful, then the act unduly restricts the right of the individual to make contracts, buy and sell property, and is invalid for that reason. With reference to this contention it might be suggested (as it has been by the government) that, as the situs of the stock which the Securities Company has bought is in the states of Wisconsin and Minnesota, which respectively chartered the Northern Pacific and Great Northern Companies, and as the stock owes its being to the laws of those states, and as each state has forbidden the consolidation of competing and parallel lines of railroad therein, and has likewise prohibited any consolidation of the "stock and franchises" of such roads, the contention last mentioned is entitled to little consideration in the case at bar.

But waiving and ignoring this suggestion, the argument advanced in behalf of the defendants is met and answered, so far as this court is concerned, by the decision in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 228, 229, 20 Sup. Ct. 96, 102, 44 L. Ed. 136, where it is said, *inter alia* :

"Under this grant of power to Congress (the power to regulate commerce between the several states and with foreign nations), that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate, to any substantial extent, interstate commerce. * * * We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts, limits the power of Congress and prevents it from legislating on the subject of contracts of the class mentioned. * * * It has been held that the word 'liberty,' as used in the Constitution, was not to be confined to the

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mere liberty of persons, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. * * * But it has never been, and in our opinion ought not to be held, that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature, and wholly irrespective, among other things, of the fact that they would, if performed, result in the regulation of interstate commerce, and in violation of an act of Congress upon that subject. The provision of the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is to some extent limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate [730] to a greater or less degree commerce among the states. We cannot so enlarge the scope of the language of the Constitution regarding the liberty of the citizen as to hold that it includes, or that it was intended to include, a right to make a contract which in fact restrained and regulated interstate commerce, notwithstanding Congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts."

These observations, as a matter of course, preclude further controversy over the power of Congress to limit to some extent the right to make contracts when enacting laws for the regulation of commerce between the states.

Learned counsel for the defendants further contend as follows: That the anti-trust act was not intended to include or prohibit combinations looking to the virtual consolidation of parallel and competing lines of railroad, although such a combination operates to stifle competition; that no relief can be granted to the government in this instance, because the combination or conspiracy of which it complains has accomplished its purpose, to wit, the organization of the Securities Company and the lodgment of the majority of the stock of the two railroads in its hands before the bill was filed; and, finally, that the combination proven was one "formed in aid of commerce and not to restrain it;" in other words, that it was one formed to enlarge the volume of interstate traffic and thus benefit the public.

The court cannot assent to either of these propositions.

The first, we think, is clearly untenable for the reasons already stated and fully disclosed in the decisions heretofore cited.

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Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the anti-trust act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce, that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it.

Relative to the third contention, which has been pressed with great zeal and ability, this may be said: It may be that such a virtual consolidation of parallel and competing lines of railroad as has been effected, taking a broad view of the situation, is beneficial to the public rather than harmful. It may be that the motives which inspired the combination by which this end was accomplished were wholly laudable and unselfish; that the combination was formed by the individual defendants to protect great interests which had been committed to their charge; or it may be that the combination was the initial [731] and a necessary step in the accomplishment of great designs, which, if carried out as they were conceived, would prove to be of inestimable value to the communities which these roads serve and to the country at large.

We shall neither affirm nor deny either of these propositions, because they present issues which we are not called upon to determine, and some of them are issues which no

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court is empowered to hear or decide, involving, as they do, questions of public policy which Congress must determine. It is our duty to ascertain whether the proof discloses a combination in direct restraint of interstate commerce; that is to say, a combination whereby the power has been acquired to suppress competition between two or more competing and parallel lines of railroad engaged in interstate commerce. If it does disclose such a combination—and we have little hesitation in answering this question in the affirmative—then the anti-trust act, as it has been heretofore interpreted by the court of last resort, has been violated, and the government is entitled to a decree.

A decree in favor of the United States will accordingly be entered to the following effect: Adjudging that the stock of the Northern Pacific and Great Northern Companies, now held by the Securities Company, was acquired in virtue of a combination among the defendants in restraint of trade and commerce among the several states, such as the anti-trust act denounces as illegal; enjoining the Securities Company from acquiring or attempting to acquire further stock of either of said companies; also enjoining it from voting such stock at any meeting of the stockholders of either of said railroad companies, or exercising or attempting to exercise any control, direction, supervision, or influence over the acts of said companies or either of them by virtue of its holding such stock; enjoining the Northern Pacific and Great Northern Companies, respectively, their officers, directors, and agents, from permitting such stock to be voted by the Northern Securities Company, or any of its agents or attorneys on its behalf, at any corporate election for directors or officers of either of said companies; and likewise enjoining them from paying any dividends to the Securities Company on account of said stock, or permitting or suffering the Securities Company to exercise any control whatsoever over the corporate acts of said companies, or to direct the policy of either; and, finally, permitting the Securities Company to return and transfer to the stockholders of the Northern Pacific and Great Northern Companies any and all shares of stock of those companies which it may have received from

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such stockholders in exchange for its own stock, or to make such transfer and assignment to such person or persons as are now the holders and owners of its own stock originally issued in exchange for the stock of said companies.

THE DECREE.

It was ordered, adjudged, and decreed as follows, to wit :

That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several states, such as an act of Congress, approved July 2, 1890, 26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies," denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company now claimed to be held and owned by the defendant the Northern Securities Company was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several states; that the Northern Securities Company, its officers, agents, servants, and employes, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and

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agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies. .

It is further ordered and adjudged that the United States recover of and from the defendants its costs herein expended, the same to be taxed by the clerk of this court, and have execution therefor.

HENRY C. CALDWELL,
Presiding Judge.
WALTER H. SANBORN,
AMOS M. THAYER,
Circuit Judges.

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**[608] BOARD OF TRADE OF CITY OF CHICAGO *v.*
CHRISTIE GRAIN & STOCK CO. ET AL.^a**

(Circuit Court, W. D. Missouri. March 19, 1903.)

[121 Fed., 608.]

EXCHANGES—CONTRACT FOR DISTRIBUTION OF QUOTATIONS—LEGALITY OF RESTRICTIONS.—A contract between a board of trade, having a property right in the quotations made on its exchange, and a telegraph company, relating to the transmission and distribution of such quotations by the latter, is not in violation of the anti-trust act of 1890 (Act July 2, 1890, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), as in restraint of trade and commerce, because of a provision that the quotations shall only be furnished to persons who sign an agreement to the effect that they shall not be used in the conduct of a bucket shop.^b

In Equity. On final hearing.

For former opinion, see 116 Fed. 944.

Hook, District Judge.

The only question of consequence presented at the final hearing which was not fully argued at the preliminary hearing is whether the arrangement between the board of trade and the telegraph companies is violative of the provisions of the Sherman act (Act July 2, 1890, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). This proposition may be roughly stated as follows: The board of trade, having a property right in its quotations, contracted with the telegraph companies for their transmission and distribution by the latter; such transmission and distribution to be confined to persons who would sign an application embodying an agreement to the effect that the quotations should not be used in the conduct of an unlawful business, to wit, a bucket shop. Is such an arrangement

^a An injunction was granted by the Circuit Court July 5, 1902 (116 Fed., 944), but it was not based in any way upon the anti-trust law, and therefore the decision is not reprinted. On final hearing, March 19, 1903, the court considered the matter from the standpoint of the anti-trust law and adhered to its original conclusions (121 Fed., 608). See above. The decree was reversed by the Circuit Court of Appeals, Eighth Circuit (125 Fed., 161), but not upon any ground related to the anti-trust law. Decision not reprinted. The action of the Circuit Court of Appeals was reversed by the Supreme Court, and the injunction allowed (198 U. S., 236). See p. 717.

^b Syllabus copyrighted, 1903, by West Publishing Co.

Syllabus.

an unlawful combination in restraint of trade and commerce, within the meaning of the act of July 2, 1890, popularly known as the "Sherman Anti-Trust Act"? I am of the opinion that it is not.

Let a final decree be prepared in conformity with the above, and the conclusions heretofore announced in this case.

[115] METCALF v. AMERICAN SCHOOL FURNITURE CO. ET AL.^a

(Circuit Court, W. D. New York. March 7, 1903.)

[122 Fed., 115.]

EQUITY—PLEA—SETTING DOWN FOR HEARING.—Where a plea has been set down for argument by complainant, the facts stated therein must be taken as true.^b

CORPORATIONS—ACTION BY STOCKHOLDER.—Where the action of a corporation in making a transfer of all of its property was illegal, and it is under the control of the directors who made such transfer, a stockholder may maintain a suit on behalf of the corporation to set aside the transfer.

SAME—POWERS—SALE OF ALL ITS PROPERTY.—A corporation organized under the laws of West Virginia has power, under Code W. Va. 1899, c. 53, § 56, to sell and transfer all of its property and discontinue its business by the action of the holders of a majority of the stock, taken at a general stockholders' meeting.

SAME—RATIFICATION OF UNAUTHORIZED SALE.—Where a corporation has power to transfer all of its property by a vote of a majority of its stock, such a transfer, made by its directors without actual fraud, may be validated by a subsequent ratification by the stockholders.

SAME—RIGHTS OF MINORITY STOCKHOLDERS—EFFECT OF STATUTE.—Where the charter and by-laws of a corporation and the statutes of the state under which it is organized, vest in a majority of the stockholders the right to sell the property of the corporation and to discontinue its corporate existence, every stockholder takes his stock subject to such right; and a minority stockholder must submit to the action of the majority in exercising such power, in the absence of fraud.

SAME—VALIDITY OF SALE—COMBINATION IN RESTRAINT OF TRADE.—The sale and transfer by a corporation of its property and good will

^a Demurrer to bill as originally filed sustained by Circuit Court (108 Fed., 909). See p. 75. Decree affirmed by Circuit Court of Appeals, Second Circuit (113 Fed., 1020), memorandum decision (see p. 111), and plaintiff allowed 30 days in which to amend. Amended bill dismissed (122 Fed., 115).

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to another corporation, where such sale was within its powers, cannot be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business, and in pursuance of an illegal combination in restraint of trade.^a

[116] SAME—SECRET PROFIT OBTAINED BY DIRECTORS.—The fact that directors of a corporation, on making a sale of its property by a secret agreement with the purchaser, obtained for themselves a portion of the consideration paid for the property, does not afford ground for a rescission of the sale at suit of the corporation or a stockholder; the remedy being by suit against the directors for an accounting.

SAME—RESCISSION—EXECUTED CONTRACT.—A contract by a corporation for the sale of its property cannot be rescinded by the corporation, or at suit of a stockholder suing in its right, on the ground that it was ultra vires, where it has been fully executed by a transfer of the property and the receipt of the price.

SAME—PAYMENT FOR PROPERTY SOLD—ACCEPTANCE OF STOCK IN ANOTHER CORPORATION.—Where a corporation is given by its charter the right to dispose of its property and to discontinue its corporate existence, it has the power to accept stock in another corporation in payment of the purchase price of its property, provided the transaction is bona fide.

SAME—CONSTRUCTION OF STATUTE.—The provisions of Code W. Va. 1899, c. 52, §§ 3, 4, which prohibit the purchase of stocks, bonds, or securities by a corporation, except when taken in payment of a debt, or as security therefor, apply only while the corporation is a going concern, engaged in carrying on the business for which it was created.

[SAME—INJUNCTIVE RELIEF—ANTI-TRUST LAW.—The only party entitled to maintain a bill in equity for injunctive relief for violating the provisions of the anti-trust act is the United States attorney, at the instance of the Attorney-General.

In Equity. On demurrers and pleas.

Seymour, Seymour & Harmon, for complainant.

Daries, Stone & Auerbach (*Brainard Tolles*, of counsel), for defendants American School Furniture Co., Oakman, and Turnbull.

Cox, Kernan & Kimball (*Maulsby Kimball*, of counsel), for defendants Buffalo School Furniture Co. et al.

HAZEL, District Judge.

This cause was heretofore considered by this court (108 Fed. 909), and the demurrers then interposed were sustained

^a Validity of monopolistic contracts as affected by public policy, see note to *Cravens v. Carter-Crume Co.*, 34 C. C. A. 486.

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on the ground of multifariousness. In the former bill of complaint, relief was sought in equity by complainant as a minority stockholder, suing for herself and in behalf of other stockholders of defendant Buffalo School Furniture Company, and to recover treble damages, under the anti-trust act of July 2, 1890 (26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). It was held that such damages were only recoverable in an action at law by the complainant, and inured to her sole benefit, while the equitable relief sought by the bill was for the benefit of the corporation in whose behalf the suit was brought, and therefore inconsistent remedies were averred in the bill. The order sustaining the demurrers to the original bill recites that they are sustained solely and only upon the ground of multifariousness, although the precise questions here involved were also then considered. The opinion of the court, however, merely indicated an impression that the bill, with the inferences deduced therefrom, sufficiently averred a conspiracy in restraint of trade and commerce to enable the complainant to give evidence upon the trial in support of the charge. Subsequently the parties appeared before the court in settlement of the terms of the order, with the result that the restrictive order sustaining the demurrer because of multifariousness, only, was entered. On appeal the Circuit Court of Appeals affirmed the decision of the Circuit Court, with leave to amend the bill. 113 Fed. 1020. The precise questions now considered not having been determined on the former hearing, as appears by the order sustaining the demurrer because of multifariousness, the contention of the complainant that the defendants' demurrers were overruled upon every other ground therein stated cannot be maintained. The amended bill which is now before me has eliminated the demand for treble damages, but in all other respects the relief demanded is practically similar to that of the original bill. All the defendants, except Oakman and Turnbull, have demurred to part, answered to part, and all the defendants have filed pleas in bar to part of the bill now considered.

The grounds of demurrers may be subdivided and briefly summarized into four general grounds, as follows: (1) Want of equity; (2) complainant has no legal capacity to sue; (3)

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that the cause assigned for equitable relief does not entitle complainant to the character of the relief prayed for; (4) defect of parties plaintiff or defendant, in that there are interested stockholders, without whose presence relief ought not to be granted.^a

* * * * *

[126] I do not understand that it is claimed by complainant that this court has the power to take cognizance of the alleged illegal combination because of the provisions of the anti-trust act of 1890 (26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). It has been many times decided, and no longer admits of any question or doubt, that the only party entitled to maintain a bill in equity for injunctive relief for violating the provisions of the anti-trust act is the United States attorney, at the instance of the Attorney General. *Pidcock v. Harrington* (C. C.) 64 Fed. 821; *Southern Indiana Express Co. v. U. S. Co.* (C. C.) 88 Fed. 659; *Connolly v. Union Sewer Pipe Co.*, supra.^a

* * * * *

It follows from the foregoing that the bill must be dismissed, with costs, and the pleas of the various defendants allowed. The complainant, however, is entitled to take issue, if she shall see fit, upon the facts stated in the plea, by filing replication within thirty days from the entry of an order in accordance with this opinion.

[529] UNITED STATES v. SWIFT & CO. ET AL,^b

(Circuit Court, N. D. Illinois, N. D. April 18, 1903.)

[122 Fed., 529.]

INTERSTATE COMMERCE ACT—COMMERCE.—Commerce is the sale or exchange of commodities, but that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. It includes the intercourse—all the initiatory and inter-

^a It is not deemed advisable to reprint the entire opinion, as very little of it relates to the anti-trust law. This may be seen by consulting the syllabus, which is printed in full.

^b Decree modified and affirmed by Supreme Court (196 U. S., 375). See p. 641.

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vening acts, instrumentalities, and dealings—that directly bring about the sale or exchange.

SAME—RESTRAINT OF TRADE.—Restraint of trade is not dependent upon any consideration of reasonableness or unreasonableness in the combination averred, nor is it to be tested by the prices that result from the combination. The statute has no concern with prices, but looks solely to competition and to the giving of competition full play by making illegal any effort at restriction upon competition.

SAME.—The agreement of the defendants to refrain from bidding against each other in the purchase of cattle is combination in restraint of trade; so also their agreement to bid up prices to stimulate shipments, intending to cease from bidding when the shipments have arrived, and the same result follows from the combination of defendants to fix prices upon and restrict the quantities of meat shipped to their agents or their customers. Being restriction upon competition, such agreements are combination in restraint of trade.^a

The defendants are seven corporations, one copartnership, and twenty-three other persons, and the petition is fairly summarized as follows:

1st. "That at the time of its filing they had been and then were engaged in the business of buying live stock at divers points throughout the United States where stockyards existed, and slaughtering the same at such places in different states and converting the same into fresh meats for human consumption.

2nd. "That they had been and then were engaged in the business of selling such fresh meats at the places where prepared, to dealers and consumers in divers other states and territories of the United States and in foreign countries, and shipping the same when so sold, from said places of preparation to such dealers and consumers, pursuant to such sales, and were thus engaged in trade and commerce among the several states and territories and with foreign nations.

3rd. "That they had been and then were engaged in the business of shipping such fresh meats from said points where so prepared, by common carriers to the respective agents of the defendants located at and near the principal markets of such meats in other states and territories and in foreign countries for sale by those agents in those markets to dealers and consumers, which they there sold through their agents and were thus engaged in trade and commerce among the several states and territories and with foreign nations.

4th. "That of the total volume of trade and commerce among the said states and territories in fresh meats the said defendants together controlled about sixty per cent.

5th. "That as to such trade and commerce among the several states and territories and foreign nations in fresh meats, the said defendants should, and but for the acts hereinafter complained of would be and remain in competition with each other.

6th. "That said defendants, in violation of the act of congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] and

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in order to restrain competition among themselves as to the purchase of livestock necessary to the production of the meats produced by them, have engaged in, [530] and intended to continue an unlawful combination and conspiracy between themselves for directing and requiring their respective purchasing agents at the said several stockyards and markets where they customarily purchase such livestock, which livestock is produced and owned principally in other states and territories of the United States, and shipped by the owners thereof to such stockyards for competitive sale, to refrain from bidding against each other when making purchases of such livestock, and by these means inducing and compelling the owners of such livestock to sell the same at less prices than they would receive if such bidding were competitive; which combination and conspiracy is in restraint of trade and commerce among the several states, etc.

7th. "That said defendants, in further violation of said act, and in order to further restrain competition among themselves, which would otherwise exist, as to the purchase of livestock necessary to the production of the meats produced by them, have engaged in and intend to continue an unlawful combination and conspiracy among themselves for bidding up through their agents the prices of livestock for a few days at said stockyards, thereby inducing shippers from other states and territories to make large shipments of such livestock to such stockyards, and then refrain from bidding up such livestock, and thereby obtaining such livestock at prices much less than it would bring in the regular way of trade.

8th. "That said defendants, in further violation of said act, and in order to restrain and destroy competition among themselves as to such trade and commerce and to monopolize the same, have engaged in and intend to continue an unlawful combination and conspiracy to arbitrarily, from time to time, lower and fix prices, and maintain uniform prices at which they will sell, directly or through their respective agents, such fresh meats to dealers and consumers throughout said states and territories and foreign countries. That the arbitrary raising, lowering, fixing, and maintaining of said prices is effected through the action of divers of their agents in secretly holding periodical meetings, and there agreeing upon the prices to be adopted by said defendants respectively in such trade and commerce, which said prices are notified by letters and telegrams, and are adhered to in their sales, which are made directly, and among other ways; and by collusively restricting and curtailing the quantities of such meats shipped by them in pursuance of such combination, and imposing against each other divers penalties for any deviations from such prices, and establishing a uniform rule for the giving of credit to dealers throughout the said states and territories and foreign countries, and for the conduct of the business of such dealers, with penalties for violations thereof, by notifying each other of the delinquencies of said dealers, and keeping what is commonly known as a 'black list' of such delinquents, and refusing to sell meats to any of such delinquent dealers.

9th. "And the said defendants, in violation of the provisions of the said act, have engaged in and intend to continue an unlawful combination and conspiracy, to direct and require their respective agents at and near many of the markets for such fresh meats throughout the United States and territories to arbitrarily make and impose uniform charges for cartage for delivery, upon making such sales to dealers and consumers in those markets of the meats shipped to them through said agents by the said defendants respectively from their several points of preparation, thereby increasing the charges for such meats to said dealers and consumers.

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10th. "That notwithstanding the common carriers by railroad subject to the provisions of the laws of the United States for the regulation of commerce, have established and published their schedule of rates, fares and charges for the transportation of livestock, and for the transportation of meats, which are the only lawful rates for such transportation, the said defendants, intending thereby to monopolize the commerce aforesaid, and prevent competition therein, have made and are making agreements and arrangements with divers officers and agents of such common carriers whereby the said defendants were to receive, and will continue to receive, by means of rebates and other devices, unlawful rates for such transportation, less than the lawful rates, which rebates they divide, among themselves [531] and will continue to do so unless restrained by the injunction of this court, which is a scheme to monopolize, and also a combination and conspiracy in restraint of trade and commerce among the several states and territories and with foreign nations.

11th. "That the said defendants now are, and for years past have been in combination and conspiracy with each other and with the railroad companies and others to complainant unknown, to obtain a monopoly of the supply and distribution of fresh meats throughout the United States and its territories and foreign countries, to that end the defendants do and will artificially restrain such commerce and put in force abnormal, unreasonable and arbitrary regulations for the conduct of their own and each other's business, effecting the same from the shipment of the livestock from the plains to the final distribution of the meats to the consumer. All to the injury of the people and in defiance of law."

To this petition five of the defendant corporations have filed joint and several demurrers, the grounds of which are as follows:

"The bill of complaint does not allege any contract, combination or conspiracy in restraint of interstate or foreign trade or commerce within the meaning of said act of congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

"The bill of complaint does not allege any acts of defendants monopolizing, or attempting to monopolize, or combining or conspiring to monopolize any part of such trade or commerce within the meaning of said act.

"If the act of congress in question should be given a construction which would sustain this bill of complaint, such act would violate the provisions of the Constitution of the United States.

"Said bill is multifarious.

"There is a misjoinder of causes of action and of persons in said bill, as alleged in said demurrers.

"The said bill of complaint and the allegations and charges therein are not sufficiently definite or specific, but are too general and indefinite."

The hearing is on these demurrers and on motion for an injunction.

John K. Richards, S. H. Bethea, and W. A. Day, for the United States.

John S. Miller, and Merritt Starr, for defendants.

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After the foregoing statement of facts, GROSSCUP, Circuit Judge, delivered the opinion:

Commerce, briefly stated, is the sale or exchange of commodities. But that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. It includes the intercourse—all the initiatory and intervening acts, instrumentalities and dealings—that directly bring about the sale or exchange. Thus, though sale or exchange is a commercial act, so also is the solicitation of the drummer, whose occupation it is to bring about the sale or exchange. *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. The whole transaction from initiation to culmination is commerce.

When commerce, thus broadly defined, is between parties dealing from different states—to be effected so far as the immediate act of exchange goes by transportation from state to state—it is commerce between the states," within the meaning of the constitution, and the statute known as the Sherman Act. But it is not the transportation that constitutes the transaction interstate commerce. That is an adjunct only, essential to commerce, but not the sole test. [532] The underlying test is that the transaction, as an entirety, including each part calculated to bring about the result, reaches into two or more states; and that the parties dealing with reference thereto deal from different states.

An interstate commercial transaction is, in this sense, an affair rising from different states, and centering in the act of exchange, each essential part of the affair being as much commerce as is the center. With this definition in mind, let us see what the transaction made out in the petition is.

For the purpose of clear exposition, the facts set forth in the petition should be separated into two groups—those that are intended to bring the transaction within the body of interstate commerce; and those that are intended to fix upon such transaction the character of unlawful combination and conspiracy. Shorn of verbiage, and of immaterial accessories, the first group may be stated as follows: The defendants controlling sixty per cent. of the trade and commerce in fresh meats in the United States, buy, in the course of

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their business, livestock shipped from points throughout the United States; which, having been converted into fresh meats, is sold again by them at the places where prepared, to dealers and consumers in other states; or is sold through their agents, located in other states, to dealers and consumers in the states where the agents are located. The shipment in the first class of sales is made directly from the places where the meat is prepared to the dealers and consumers in other states, and in the latter class to the agents in the other states who, upon sale, deliver directly to the dealer and consumer.

What may be called the body of these transactions is two-fold. It reaches backward to the purchase of cattle that come to defendants from states other than those in which defendants manufacture; and it reaches forward to the sale of the meats, after conversion, to parties dealing with respect thereto from states other than the state of the defendants; followed by shipments into the other states. Each of these transactions constitute, in my judgment, interstate commerce. The purchase of cattle shipped habitually from other states to the markets where defendants purchase, in the expectation that the purchase will be made by the slaughter companies, is an act of interstate commerce. *Hopkins' Case*, 171 U. S. 590, 19 Sup. Ct. 40, 43 L. Ed. 290.

It is none the less interstate commerce merely because the local incidents or facilities for such purchase are to be regarded as outside the interstate character of the transaction. Thus the local commission broker, or the men who drive the cattle from the pens to the slaughter house, need not, in any survey of the transaction, be held to be within the interstate status of the transaction. With them, it is essentially the same whether the cattle come from the state in which the purchase is made, or from other states. They are aids or facilities only, and as such are merely local incidents. But the purchase of livestock thus brought habitually from other states, relates, in its larger bearings, to a transaction that had its beginning in other states. The original shipments are influenced, and to a large extent brought about, by the character of the purchase.

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[533] The purchase, the shipments, and the transportation, are commercially interdependent; and in any survey of the transaction, as an entirety, none could be omitted. They each go to make the transaction, and covering different states, they stamp the transaction—not all its incidents, but its essential body—as a transaction in interstate commerce.

Coming, now, to the other branch of the transaction—the sales by the defendants—a like result follows. Unquestionably it is interstate commerce when purchasers from other states buy directly from the defendants, and have the meats shipped to them by the vendors. The situs of such a transaction, both as to initiatory intercourse, and as to transportation in furtherance of the exchange, includes a state other than the one from which defendants deal.

I think the same is true of meat sent to agents, and sold from their stores. The transaction in such case, in reality, is between the purchaser and the agents' principal. The agents represent the principal at the place where the exchange takes place; but the transaction, as a commercial entity, includes the principal, and includes him as dealing from his place of business. Indeed such privity exists between the principal and the transaction, that he could, at the instant, as a citizen of another state, sue upon the transaction in the federal courts; nor have I any question that if the conditions of this case were reversed, so that defendants were invoking the shelter, instead of seeking to escape, the obligations of the commerce clause, federal law would be found equal to the protection asked.

I need not dwell on the contention of defendants that the fresh meats in the hands of the agents are subject to ordinary state taxation, or upon the cases cited in this connection. It is enough to say that because a thing can be taxed by the state, it does not follow that it lies outside the body of interstate commerce; for commerce, interstate as well as domestic, is subject to the police and taxing power of the state, so long as the exercise of such power does not interfere with the national government's exclusive right of regulation. *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Austin v. Tennessee*, 179 U. S. 349, 21 Sup. Ct. 132, 45 L. Ed. 224; Prentice and Egan

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on the Commerce Clause of the Constitution, p. 27. Nor shall I differentiate the *Knight Case*, 155 U. S. 685, 15 Sup. Ct. 248, 39 L. Ed. 310; the *Hopkins Case*, and other cases urged upon me as applicable to the case under consideration. A study of these cases will show that they are not in conflict with the views already expressed.

The next inquiry is this: Do the facts set forth in the second grouping, fix upon the transaction, even though the transactions be within the body of interstate commerce, the character of unlawful combination. The averments of the petition in this respect may be summarized as follows: That the defendants are engaged in an unlawful combination and conspiracy under the Sherman act in (a) directing and requiring their purchasing agents at the markets where the livestock was customarily purchased, to refrain from bidding against each other when making such purchases; (b) in bidding up through their agents, the prices of livestock for a few days at a time, to induce [534] large shipments, and then ceasing from bids, to obtain livestock thus shipped at prices much less than it would bring in the regular way; (c) in agreeing at meetings between them upon prices to be adopted by all, and restriction upon the quantities of meat shipped; (d) in directing and requiring their agents throughout the United States to impose uniform charges for cartage for delivery, thereby increasing to dealers and consumers the charges for such meats; and (e) in making agreements with the transportation companies for rebates and other discriminative rates.

No one can doubt that these averments state a case of combination. Whether the combination be unlawful or not, depends on whether it is in restraint of trade. The general meaning of that term is no longer open to inquiry. It has been passed upon carefully by the Supreme Court in the *Freight Association Case*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and in the *Traffic Case*, 171 U. S. 558, 19 Sup. Ct. 25, 43 L. Ed. 259, where the whole subject was a year later elaborately re-argued. I will not extend into this opinion even a summary of these cases. It is clear from them that restraint of trade is not dependent upon any consideration of

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reasonableness or unreasonableness in the combination averred; nor is it to be tested by the prices that result from the combination. Indeed, combination that leads directly to lower prices to the consumer may, within the doctrine of these cases, even as against the consumer, be restraint of trade; and combination that leads directly to higher prices, may, as against the producer be restraint of trade. The statute, thus interpreted, has no concern with prices, but looks solely to competition, and to the giving of competition full play, by making illegal any effort at restriction upon competition. Whatever combination has the direct and necessary effect of restricting competition, is, within the meaning of the Sherman act as now interpreted, restraint of trade.

Thus defined, there can be no doubt that the agreement of the defendants to refrain from bidding against each other in the purchase of cattle, is combination in restraint of trade; so also their agreement to bid up prices to stimulate shipments, intending to cease from bidding when the shipments have arrived. The same result follows when we turn to the combination of defendants to fix prices upon, and restrict the quantities of meat shipped to their agents or their customers. Such agreements can be nothing less than restriction upon competition, and, therefore, combination in restraint of trade; and thus viewed, the petition, as an entirety, makes out a case under the Sherman act.

The demurrer challenges the petition for multifariousness and misjoinder of parties; and challenges each paragraph of the petition, standing separately, as insufficient to constitute a case under the Sherman act. But the paragraphs can not properly be looked upon as separate causes of action. They relate clearly to each other, thus constituting a whole that is the sum of the parts; and thus regarded, are free from the objections indicated.

It may be true that the way of enforcing any decree under this petition is beset with difficulties, and that a literal enforcement may result in vexatious interference with defendant's affairs. But in the inquiry [535] before me, I am not at liberty to stop before such considerations. The Sherman act, as interpreted by the Supreme Court, is the law of

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the land, and to the law as it stands both court and people must yield obedience.

The demurrer is overruled, and the motion for preliminary injunction granted.

[692] STATE OF MINNESOTA *v.* NORTHERN SECURITIES CO. ET AL.^a

(Circuit Court, D. Minnesota, Third Division. August 1, 1903.)

[123 Fed., 692.]

MONOPOLIES—COMBINATIONS IN RESTRAINT OF TRADE AND COMMERCE—MINNESOTA STATUTE.—The anti-trust law of Minnesota (Laws 1899, p. 487, c. 359), making unlawful any contract or combination in restraint of trade or commerce within the state, is in substantially the same language as the Sherman anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and must receive a similar construction. Following the decisions of the United States Supreme Court construing the latter act, the Minnesota law applies to railroads, and any contract or arrangement between railroad companies for the purpose and having the effect of preventing competition by fixing rates to be maintained by the parties is in violation of its provisions; but contracts or combinations which do not directly and necessarily affect transportation, or rates therefor, are not in restraint of trade or commerce, nor within the statute, even though they may remotely and indirectly appear to have some probable effect in that direction.^b

SAME—RAILROADS—STOCK-HOLDING CORPORATION.—A holding corporation organized by individual stockholders of two railroad companies, owning and operating substantially parallel and competing lines of railroad within the state of Minnesota, for the sole purpose of acquiring, by the exchange of its own stock therefor, stock of the two companies, and holding and voting the same, but having no power or franchise to operate a railroad, is not in violation of the Minnesota anti-trust law (Laws 1899, p. 487, c. 359), which provides that "any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust or otherwise * * * which is in restraint of trade or commerce within this state, * * * is hereby prohibited and declared to be unlawful," where the purpose of its promoters was thereby to acquire and retain in the same hands a majority of the stock of one or both companies, to insure

^a Reversed by Supreme Court, with direction that the case be remanded to the State court (194 U. S., 48). See p. 533.

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uniformity of policy and stability of management, although it in fact acquired the controlling interest in both, in the absence of any evidence that it ever exercised its power to prevent competition between the two roads, or to interfere in any manner with the fixing of rates by either company.

SAME—ENFORCEMENT OF STATUTE—JURISDICTION OF EQUITY.—The anti-trust law of Minnesota (Laws 1899, p. 487, c. 359) imposes severe penalties for its violation, but contains no provision for restraining or enjoining violations, and without such statutory authority a court of equity has no jurisdiction to enjoin an act which constitutes a criminal offense.

RAILROADS—MINNESOTA STATUTE AGAINST CONSOLIDATION—STOCK-HOLDING CORPORATION.—The Minnesota statute prohibiting the consolidation of parallel and competing lines of railroad (Laws 1874, p. 154, c. 29, and subsequent enactments of the same tenor), which provides that "no railroad corporation or the lessees, purchasers or managers of any railroad corporation shall consolidate the stock, property or franchise of such corporation [693] with, or lease or purchase the works or franchise of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line," does not apply to a corporation organized by individual stockholders of two companies, owning parallel and competing lines of railroad, for the sole purpose of acquiring, holding, and voting stock of the two companies, in the formation of which neither company had any part, and which has no powers or franchise as a railroad company. Such a corporation is merely an investing stockholder, and not a railroad corporation, nor a lessee, purchaser, or manager of a railroad corporation, within the terms of the statute; and, although it may acquire and own a majority of the stock of both companies, it does not thereby effect a consolidation, where the companies still maintain their separate organizations, with separate boards of directors and managing officers.

In Equity. On final hearing.

W. B. Douglas, M. D. Munn, and Geo. P. Wilson, for complainant.

Young & Lightner, for Northern Securities Co. and J. J. Hill.

C. W. Bunn, for Northern Pacific Ry. Co.

M. D. Grover, for Great Northern Ry. Co.

LOCHREN, District Judge.

This cause came on for final hearing at St. Paul June 5, 1903, upon the bill, answers, and testimony taken and on file.

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That the cause is one of equitable cognizance, and that this court has rightful jurisdiction of the same, was conceded by counsel. The cause was fully argued, and upon full consideration the following facts appear and are established:

First. The defendant the Great Northern Railway Company is a Minnesota corporation, which has, as stated in the bill, acquired the property rights and franchises, and the management and control, of various specified railway corporations. The defendant the Northern Pacific Railway Company is a Wisconsin corporation, which filed its articles of incorporation in Minnesota, and in 1896 purchased and acquired all the railroad properties, railway lines, right of way, rolling stock, and franchises of the earlier Northern Pacific Railroad Company, and has also, as stated in the bill, acquired the property rights and franchises and the management and control of other specified railway corporations. The said Great Northern and Northern Pacific Companies now, and for many years, severally own, operate, and maintain a main line of railway extending from the cities of Duluth, St. Paul, and Minneapolis westward, across the states of Minnesota, North Dakota, Montana, Idaho, and Washington, to Puget Sound, with many branches along the route of each, and that said two systems of railroad are, as to each other, parallel and competing lines of railway, at least between cities and towns reached or traversed by the lines of both of said two railways, among which are Duluth, St. Paul, Minneapolis, Anoka, St. Cloud, Moorehead, East Grand Forks, and several other towns in the state of Minnesota, and that a reasonable degree of competition for the traffic between places so situated on both said lines of railway has existed in the past years.

Second. The state of Minnesota has heretofore made large grants of its swamp lands in aid of the construction of portions of the railways of each of said companies, and, in the support of its various state institutions—educational, eleemosynary, and otherwise—transports an- [694] nually large quantities of goods, stores, and supplies upon said two railroads; and large quantities of wheat and other products owned and produced by citizens and inhabitants of Minnesota are annually carried over said railroads from competi-

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tive places in the western part of the state to Duluth, St. Paul, and Minneapolis.

Third. In 1874 the Legislature of the state of Minnesota enacted a statute known as chapter 29, p. 154, of the General Laws of 1874, as follows:

"SECTION 1. No railroad corporation, or the lessees, purchaser or manager of any railroad corporation, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line, and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil cases."

In 1881 the Legislature of Minnesota enacted a statute (Laws 1881, p. 109, c. 94) authorizing and empowering any railroad corporation, domestic or foreign, to consolidate its stock and franchises with, or lease or purchase or in any way become owner of or control the stock of any other railroad corporation when their respective railroads can be connected and operated together so as to constitute a continuous main line, with or without branches. But the same statute reiterated the prohibition against the consolidation of railroads having parallel and competing lines, and by a subsequent amendment of this statute (Laws 1899, p. 253, c. 229) the same prohibition was again enacted almost in the language of the act of 1874, above quoted. In 1899 the Legislature of Minnesota also enacted a statute known as the "Anti-trust law" (Laws 1899, p. 487, c. 359), which provided:

"SECTION 1. Any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust or otherwise, hereafter entered into which is in restraint of trade or commerce within this state, or in restraint of trade or commerce between any of the people of this state and any of the people of any other state or country, * * * is hereby prohibited and declared to be unlawful."

Severe penalties are denounced against all who shall violate the act, including the forfeiture of the charter of any offending corporation. And it is made the duty of the Attorney General to institute, in the name of the state, proceedings in any court of competent jurisdiction to recover the penalties imposed, and also, in the case of offending corporations, to enforce the forfeiture of their charters.

Fourth. The railroads both of the Great Northern and

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Northern Pacific Companies between the Missouri river and Puget Sound pass through long stretches of mountainous and unsettled or sparsely settled country, which supplies comparatively little traffic or business to these railroads. But the forests near Puget Sound produce a great supply of lumber, readily marketable east of the Missouri river, and in Iowa, Illinois, Nebraska, and Missouri. To transport it over these railroads (which in the direction of the principal markets for the lumber ended at St. Paul) at rates which would make the business practicable, it was necessary that west-bound freight should be se- [695] cured for the cars which would bring the lumber eastward. The Great Northern Company and Northern Pacific Company were alike interested in this business, and, acting in harmony, in the spring of 1901, purchased substantially all the shares of the Chicago, Burlington & Quincy Railway Company (each company buying and owning one-half), at \$200 per share, amounting to \$108,000,000, par value, the cost being about \$216,000,000; paying for the same in the joint 4 per cent. bonds of the two purchasing companies. As the Burlington system so purchased has a railway extending from Minneapolis and St. Paul to Chicago, and railways covering large portions of the states of Illinois, Iowa, Missouri, and Nebraska, and connecting again with the Northern Pacific at Billings, in Montana, it, though still managed by its own directors and officers, affords to the two purchasing railroads the needed mutual extension to transport their trains of lumber to desirable markets, and to bring return traffic, in coal, iron, steel, cotton, and other commodities, needed on the route of these two railroads and on the Pacific Coast, and in the trade growing up between Puget Sound and Alaska, China, and Japan.

The Union Pacific Railway extends from Omaha to Ogden, and, by its connection with the Central or Southern Pacific, to San Francisco, with the branches and connections which reach points on the Great Northern and Northern Pacific in Montana and Washington. As the Burlington system connects with the Union Pacific at Omaha and elsewhere in Nebraska, and extends east, north, and south from Omaha, much of the freight gathered by it, bound for the Pacific

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Coast, passed over the Union Pacific. Hence the purchase of the Burlington system by the Great Northern and Northern Pacific, which was completed about April 1, 1901, led the managers of the Union Pacific Company to fear a diversion of this traffic from the railway of the Union Pacific to the railways of the two purchasing companies; and Edward H. Harriman, representing the Union Pacific Company, applied to James J. Hill and J. Pierpont Morgan, who respectively represented the Great Northern and Northern Pacific Companies in such purchase, to permit the Union Pacific Company to join and share with them in the purchase of the Burlington system, but his application was declined. Thereupon the said Harriman and others acting in the interest of the Union Pacific Company began rapidly and quietly to purchase the stock of the Northern Pacific Company, intending thus to acquire a majority of that stock, and the control of that company, with its half interest in the Burlington system. The common stock of the Northern Pacific Company was \$80,000,000, and it had issued and had outstanding preferred stock to the amount of \$75,000,000, which had the same voting power as the common stock, but which the company, by the action of its directors, might pay off at par, and thus retire, on the 1st day of January, 1902, or on the 1st day of any succeeding year. During the month of April and first week in May, 1901, the said Harriman and others acting with him in the interest of the Union Pacific Company purchased and held a little more than \$37,000,000 of the common stock, and a little more than \$41,000,000 of the preferred stock, of the Northern Pacific Company; being more than \$78,000,000 in all, and more than a majority of the aggregate [696] of the common and preferred stock of that company. But in the first week of May, 1901, J. P. Morgan & Co., becoming apprehensive, purchased \$15,000,000 of the common stock of the Northern Pacific Company, which, with their previous holding of that stock, and those of Mr. Hill and other stockholders of the Northern Pacific Company, who in this matter acted with Mr. Morgan, gave the latter the control of more than \$41,000,000 of such common stock; being more than a majority of that stock. As it was known that Mr. Morgan and his associates would

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insist upon the payment and retirement of the preferred stock on January 1, 1902, and that the board of directors of the Northern Pacific Company would take action to that end, Mr. Harriman and his associates abandoned their attempt to obtain the control of that company.

For many years, including the period of the construction of the Great Northern Company's railroad from the state of Minnesota to Puget Sound, and its branches and extensions in other directions, Mr. Hill, with the acquiescence of all the stockholders, had been the president and active manager of that company. The stock of that company aggregated \$125,000,000, and he, with a small number of other holders of large amounts of that stock, had for some time considered the project of uniting their holdings of stock by transferring the same to some corporation to whom any others of the holders of such stock might transfer their holdings, and thus assure permanency to the management and policy of the company.

The attempt in the interest of the Union Pacific Company to purchase a majority of the stock of the Northern Pacific Company, and obtain the control of that company, and through it of the Burlington system, alarmed the managers and stockholders of the Northern Pacific Company, and led them to consider the feasibility of forming a holding company which should purchase or secure in exchange for its own stock more than a majority of the stock of the Northern Pacific Company, and hold the same secure against any raid in the future in the interest of a rival or hostile railroad. Mr. Hill and the stockholders referred to of the Great Northern Company were likewise alarmed by such attempt in the interest of the Union Pacific Company to obtain control of the Northern Pacific, and through it of the Burlington system—a result which they apprehended would injuriously affect the property of the Great Northern Railroad, and the country traversed by it and by the Northern Pacific Railroad; and, in the project of establishing a holding company to purchase and hold a majority of the stock of the Northern Pacific Company, they joined for the purpose of selling to such holding company, and placing therein their own stock in the Great Northern Company, and permitting all other

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stockholders of the same company who might so choose to do likewise, and thus accomplish their purpose above stated of giving permanency to the management and policy of the Great Northern Company.

The incorporation of the Northern Securities Company under the general laws of New Jersey, and with a capital of \$400,000,000, was completed November 13, 1901. Neither the Great Northern Company nor the Northern Pacific Company, by any act of its directors, or any [697] corporate act, had anything to do with the formation or subsequent action of the Northern Securities Company; but Mr. Morgan, Mr. Hill, and other stockholders of the Northern Pacific Company and Great Northern Company were individually the promoters who caused and procured the incorporation of the Northern Securities Company for the purposes above stated. The Northern Securities Company, when formed, offered and agreed to purchase and to pay for in its own stock at par (\$100 per share) any stock of the Northern Pacific Company at the price of \$115 per share, and any stock of the Great Northern Company at the price of \$180 per share; and large amounts of the stock of said two railroads were, at such rates, and so paid for, purchased from said promoters and other stockholders of said two railroad companies by said Northern Securities Company. About the same time Mr. Harriman and his associates sold to J. P. Morgan & Co. all the Northern Pacific Company stock which they had purchased as aforesaid—both common and preferred—amounting to more than \$78,000,000, and said J. P. Morgan & Co. at the same time sold all the same stock to the Northern Securities Company, who paid the consideration therefor directly to Mr. Harriman and his associates; a part of such consideration being something more than \$82,000,000 of the stock of said Northern Securities Company. That purchase was completed on November 18, 1901. On January 1, 1902, the Northern Pacific Company paid off and retired its preferred stock, having raised the money for that purpose by an issue of bonds, which were made convertible and were converted into common stock of that company. Other stockholders of each of said two railroad companies sold their stock to the Northern Securities Company, receiving

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in payment or exchange therefor, at the rates aforesaid, stock of the last-named company, so that by December 1, 1901, said Northern Securities Company had become the owner of considerable more than a majority of the stock of the Northern Pacific Company, and a large amount, but less than a majority, of the stock of the Great Northern Company. Similar purchases from stockholders continued, and at the time of the commencement of this suit the Northern Securities Company had become, and still is, the owner of about 96 per cent. of all the stock of the Northern Pacific Company, and of about 76 per cent. of all the stock of the Great Northern Company.

CONCLUSIONS OF LAW.

1. It is obvious from the foregoing facts that the Northern Securities Company was incorporated with the purpose and intent on the part of its promoters that it should acquire by purchase, by exchange for its stock, and should own and control, a considerable majority of all the stock of the Northern Pacific Company, and thus secure that company against the danger of any future raid upon its stock which might place its management and the resulting control of the Burlington system in the power of any rival railroad corporation, whose interests might be hostile to the development and property of the Northern Pacific and Great Northern Companies, and their seaboard terminals, and of the region of country traversed by their railroad systems. This was the avowed purpose of Mr. Morgan and his associates who [698] acted with him in this matter, including Mr. Hill and other large stockholders of the Great Northern Company, who also held large amounts of stock in the Northern Pacific Company, and were apprehensive that any hostile control of the Northern Pacific Company which might sacrifice its interests to a rival would be disastrous to the development and prosperity of the Great Northern Company. And at the very time when the Northern Securities Company was formed and incorporated, by means of the large holdings of Northern Pacific Company stock by himself and his associates acting with him, and by the then purchase by J. P. Morgan & Co. of the Harriman holding of such stock, said

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J. P. Morgan was able at once to transfer and have transferred to the Northern Securities Company a large and controlling majority of the stock of the Northern Pacific Company, as was done; thereby accomplishing, as was believed, the purpose of securing that stock against hostile raids in the future.

With respect to the stock of the Great Northern Company, the evidence shows that, when the Northern Securities Company was incorporated, it was the purpose and intent of Mr. Hill and other large stockholders of the Great Northern Company who acted with him to sell and dispose of to the Northern Securities Company, for its stock, their several holdings of stock in the Great Northern Company, aggregating then about \$35,000,000, to the end that such large amounts of Great Northern Company's stock should be kept together, and, as it was hoped, aid in giving permanency to the management and policy which had controlled and was controlling the railway and development of that company. And it was their purpose that all other stockholders of the Great Northern Company who might choose to do so should be permitted to sell or exchange their stock of that company for stock of the Northern Securities Company on the same terms, and it was hoped and expected that many would do so. But the said Hill and his associates had no power or control which could enable them to transfer or cause to be transferred to the Northern Securities Company so much as one-third of the stock of the Great Northern Company. The evidence therefore fails to show that the Northern Securities Company was formed for the purpose of acquiring and holding a majority of the stock of the Great Northern Company, as well as that of the Northern Pacific Company, although that result followed soon after, and may have been desired and anticipated.

2. One question in this cause is whether the acquisition by the Northern Securities Company, in the manner above stated, of a majority of the capital stock of both the Great Northern and Northern Pacific Companies, which own and operate parallel and competing railroads across the state of Minnesota, and its ownership of such stock, is a violation of the Minnesota anti-trust law (Laws Minn. 1889, p. 487, c.

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359), which provides, as above stated, that "any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust or otherwise hereafter entered into which is in restraint of trade or commerce within this state * * * is hereby prohibited and declared to be unlawful."

Language in the act extending these provisions to interstate commerce is here omitted and disregarded, and the act considered valid as to trade and commerce within the state; [699] that being a proper subject for state legislation, though carried on by the same instrumentalities used in interstate commerce. The language just quoted is evidently taken from the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], known as the Sherman anti-trust act, which has received consideration by the Supreme Court of the United States in several cases.

In *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, a New Jersey corporation, already in control of most of the manufactories of refined sugar in the United States, purchased with shares of its own stock the stock of four Philadelphia refineries, and acquired nearly complete control of that business in the country. It was charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that by entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several states and with foreign nations. Held, that though the contracts of purchase of these refineries would result in a monopoly in the manufacture of refined sugar, an article certain to enter into commerce, yet the manufacture of the article was no part of commerce, and therefore the contract had no direct relation to commerce, even though to dispose of the product the instrumentality of commerce would be necessarily invoked. The product would not enter into commerce till transportation began, and the contracts had no reference to transportation.

In *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, it was held that the Sherman anti-trust act applies to railroads, and prohibits all contracts in restraint of trade, whether reason-

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able or unreasonable, and also that articles of agreement by which some 17 railroad companies formed that association, in which each railroad company had a representative, empowering the association to fix reasonable rates for the transportation of freight on said railroads (many of whom were competitive), and change such rates on proper occasion, and binding the railroad companies, under penalties, to conform their charges for transportation to the rates so to be established, was a contract in violation of that anti-trust act. Plainly, the direct and only object of this agreement was its provision for the fixing, controlling, and maintaining rates for the transportation of freight over these railroads.

United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, was like the case last cited. The association was formed between 31 railroad companies, engaged in transportation between Chicago and the Atlantic Coast. The association formed of representatives of the companies was given control over competitive transportation of freight and passengers, with power to fix rates, fares, and charges, and change the same from time to time; and to these rates the railroad companies bound themselves to conform. The principal difference between this case and the one last mentioned was that by the terms of this agreement the association was to cooperate with the interstate commerce commission, to secure stability and uniformity in the rates, fares, and charges established. It was held that this agreement also violated the anti-trust act.

[700] In *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, the members of the Kansas City Live Stock Exchange did business at the Kansas City Stockyards located partly in Kansas City, Kan., and partly in Kansas City, Mo., dealing on their own account, or as commission merchants in live stock shipped from surrounding states and territories, to the owners of which they often made advances before shipment. They were bound by articles of association and by-laws, which, among other things, fixed the minimum rates for commissions, forbade the giving of information of the condition of the market, except under specified circumstances, and forbade all dealing with any person who

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violated the rules of the exchange, or with an expelled or suspended member. Held, that the business so transacted was not commerce, although it furnished aids and facilities to interstate commerce. The court said:

"The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. Charges for such facilities as we have already mentioned are not a restraint upon that trade, although the total cost of marketing a subject thereof may be thereby increased. Charges for facilities furnished have been held not a regulation of commerce, even when made for services rendered or as compensation for benefits conferred. *Sands v. Manistee River Improvement Company*, 123 U. S. 288 [8 Sup. Ct. 113, 31 L. Ed. 149]; *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 329, 330 [13 Sup. Ct. 622, 37 L. Ed. 463]; *Kentucky & Indiana Bridge Co. v. Louisville, etc., Railroad (C. C.)* 37 Fed. 567 [2 L. R. A. 289]."

In *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, the facts were similar to those in the Hopkins Case, last cited. The holding of the court is expressed in the syllabus as follows:

"That where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld, as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and accidental, and not its purpose and object."

In *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, six corporations engaged in the manufacture, sale, and transportation of iron pipe, and being located in the states of Ohio, Kentucky, Tennessee, and Alabama, entered into a detailed agreement, parceling among themselves the business of a large number of cities in Western and Southern states, with the purpose and intent of largely increasing the price at which iron pipe should be furnished to such cities. When any such city sought competitive bids for iron pipe, the corporation entitled under this secret agreement to furnish such pipe would make its bid much above a fair market price, and the other companies would present still higher bids, to give the appearance of competition. The company intended would

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thus get the contract, but, under the same agreement, would have to pay a large bonus, to be divided among the other companies. Although these corporations were manufacturers of iron pipe, the particular agreement had reference to the sale and delivery of such pipe to municipal customers, its intended and direct effect being to exclude competition and raise the price of the commodity. The court said:

"Where the contract is for the sale of the article and for its delivery in another state the transaction is one of interstate commerce, although the vendor may also have agreed to manufacture it in order to fulfill his contract of sale. In such case a combination of this character would be properly called a combination in restraint of interstate commerce, and not one relating only to manufacture."

The proper construction of the Sherman anti-trust act, so far as it relates to railroad transportation, as deduced from these decisions of the Supreme Court appears to be this: (a) The act applies to railroads. And all contracts made between railroad companies for the purpose and having the effect of preventing competition by fixing rates, or empowering persons to fix them, and agreeing to conform to them when fixed, are in restraint of trade, and within the provisions of the statute, whether the rates so fixed are reasonable or unreasonable. (b) That contracts between divers manufacturers of a commodity, respecting their sales of that commodity, to be delivered by them outside the state, having the direct effect of stifling competition and raising the cost of the article to the purchaser, are also in restraint of trade, and within the statute. (c) That contracts which do not directly and necessarily affect transportation, or rates therefor, are not in restraint of trade, or within the statute, even though they may remotely and indirectly appear to have some probable effect in that direction.

The state anti-trust act must have the same construction in respect to traffic on railroads within the state.

Neither the Great Northern Company nor the Northern Pacific Company were parties to, or in their corporate capacity had anything to do with, the formation of the Northern Securities Company, nor of any of the contracts or proceedings complained of in the bill. The Northern Securities Company is merely an investor in and owner of a majority of the stock of each of these two railroad companies. It

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is not a railroad company, and has no franchise or power to manage or operate or direct the management or operation of either railroad in respect to rates or charges for transportation, or otherwise; and there is no scintilla of evidence that it has sought to control or interfere in respect to any of these matters. It has therefore done no act and made no contract in restraint of trade or commerce. Owning now a majority of the stock of each of these railroad companies, it has the power, by voting its stock, to elect the board of directors—the governing body—of each of these railroad companies. But the board of directors of each is a different body from the board of directors of the other, as no director of the Great Northern Company can be a director of the Northern Pacific Company. The directors of each railroad company will appoint its managing and other officers, and control its business and policy. Presumably, they will seek, in lawful ways only, to increase the business and prosperity of the railroad which they, as directors, represent.

The action of the defendant Hill in promoting the formation of the Northern Securities Company, under the circumstances and for the [702] purposes which the evidence discloses, and investing in its stock by the sale to it of his stock in the two railroad companies, involved no act or contract in restraint of trade or commerce, or affecting transportation or rates, more than any ordinary transfer of railroad stock from one person to another.

That my judgment, after most careful consideration of the facts and the law applicable thereto, as construed by the highest court, leads me to the conclusion that none of the defendants have violated the Minnesota anti-trust act—a conclusion apparently contrary to that reached by the eminent judges who, in this court, recently decided the case of *United States v. Northern Securities Company*, 120 Fed. 721, and who will doubtless in another court review this cause upon appeal—has necessarily caused hesitation and careful examination. But the rights of litigants and my own sense of duty alike require that my own deliberate judgment, guided by my understanding of authoritative expositions of the law, be given in all causes tried before me.

The decision of the case last cited, as I read it and under-

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stand it, does not specify or point out any contract, agreement, or act on the part of the defendants, or any of them, which is directly in restraint of trade or commerce, or which has any direct reference to trade, commerce, transportation, or rates, nor even any threat or avowed purpose on the part of any defendant to do any such act, or enter into any such contract or agreement. But it is argued that, because the Northern Securities Company has become the owner of a large majority of the stock of each of the two railroad corporations, it will be for its interest to suppress competition between them, by causing the two boards of directors of these railroad corporations, which it can fill by election, to enter into arrangements or agreements in restraint of trade, which will suppress competition; and as a corollary to this reasoning (or conjecture) the decision holds that the formation of the Northern Securities Company, and purchase by it of a majority of the stock of each of these railroad companies, are acts or contracts in restraint of trade, though of themselves, and without further action (not yet taken, and perhaps never to be taken) by the directors of the two railroad companies, the formation of the Northern Securities Company and its holdings of stock has and can have nothing to do, directly or indirectly, with trade, commerce, transportation, or rates.

To epitomize this decision: It is held that it will be for the interest of the Northern Securities Company to restrain trade by suppressing competition between these two railroad companies, and that by coercing or persuading the two boards of directors, whom it has the power to elect, it will certainly cause them to commit highly penal offenses, by entering into combinations, contracts, and arrangements in restraint of trade, in violation of the anti-trust act, and hence the Northern Securities Company is already guilty of these offenses that have never been committed or thought of by its officers or promoters, so far as appears, and it must be suppressed and destroyed. I am compelled to reject the doctrine that any person can be held to have committed, or to be purposing and about to commit, a highly penal offense, merely because it can be shown that his pecuniary interests will be thereby advanced, and that he has the power, either directly by him-

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[703] self, or indirectly through persuasion or coercion of his agents, to compass the commission of the offense.

Although the bill avers that the acts of the defendants complained of are in violation of the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]—the Sherman anti-trust act—the state of Minnesota has no authority to enforce that act by bill for injunction. Such a suit can only be instituted on behalf of the federal government by its attorney general, under the special provisions giving the United States Circuit Courts jurisdiction to prevent and restrain by injunction violations of that act. The state anti-trust act contains no provisions for restraining or enjoining violations of its provisions. As before stated, it is a highly penal statute; and without special statutory authority a court of equity has no jurisdiction to restrain the commission of criminal offenses which involve no threatened destruction of property or property rights.

3. The charge in the bill that the acts of the defendants contravene the statutes of Minnesota prohibiting the consolidation of parallel and competing lines of railroad presents a different question. Chapter 29, p. 154, Gen. Laws Minn. 1874, provides, as stated:

“No railroad corporation or the lessors, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control any other railroad corporation owning or having under its control a parallel or competing line.”

This is the only statute on that subject of consolidating parallel and competing railroads that need be considered, as it covers whatever is contained in any other. This statute is a valid exercise of the police power of the state. *Louisville, etc., Railroad v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849.

The prohibition against consolidating applies: (1) To railroad corporations. The Northern Securities Company is not a railroad corporation, and neither the Great Northern Company nor the Northern Pacific Company, in its corporate capacity, did any of the acts charged. (2) Lessees of railroad corporations. There were none. (3) Purchasers of railroad corporations. Construing this term as applying to

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those who acquire by deed or decree, having capacity to hold and enjoy the franchises and operate the railroad, there were none in this case. (4) Managers of railroad corporations. A railroad manager is the person having the administration, charge, and oversight of the operation and business of the railroad. Among the parties concerned, Mr. Hill alone was a railroad manager. He did not effect any consolidation. He promoted the formation of the Northern Securities Company, and sold to it stock of both railroad companies.

But the complainant contends that when the Northern Securities Company had, about December 1, 1901, purchased and become the owner of a large and controlling majority of the stock of the Northern Pacific Company, it became the purchaser of that railroad corporation, within the meaning of that word as used in the act of 1874, and became thereby disabled from acquiring, as it afterwards did, a controlling majority of the stock of the Great Northern Company. And upon the subject of purchasing a railroad by buying all the stock, I am cited [704] to chapter 94, Gen. Laws Minn. 1881, which provides that any railroad corporation may lease or purchase or become the owner or control or hold stock of any other railroad, when their respective railroads can be connected together and form a continuous line, with or without branches. But in that case the purchase of the stock would be by a railroad corporation having capacity to operate the railroad, even aside from the authority to do so either expressly or impliedly granted by this statute; and such purchaser could therefore rightfully assume the control, management, and operation of the railroad, the stock of which it had so acquired.

I am also cited to the case of *Pearsall v. Great Northern Railway*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838. Pearsall was the owner of 500 shares of the stock of the Great Northern Company, and filed the bill, in behalf of himself and other stockholders, to enjoin the Great Northern Company from entering into and carrying out an agreement with bondholders under mortgages of the Northern Pacific Company, who were about to foreclose the mortgages and reorganize the company, issuing new bonds to the

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amount of \$100,000,000, to be guarantied by the Great Northern Company, also stock to a like amount, one-half of which was to be transferred to the stockholders of the Great Northern Company in consideration of such guaranty, and thereafter at all intersecting points traffic was to be exchanged between the two companies, and the common earnings therefrom divided on a mileage basis. The bill averred that the threatened contract, if carried out, would amount to a consolidation of the two railroads, in violation of the said Minnesota statute of 1874, and endanger the value of complainant's Great Northern stock. The court held that the transfer of one-half of the capital stock of the Northern Pacific Company to the shareholders of the Great Northern Company, as a body, for a consideration coming from the Great Northern Company as a corporation, was virtually a transfer of the stock to the Great Northern Company, who, having thus acquired one-half of the stock of the Northern Pacific Company, would easily and certainly obtain the little more necessary to assure it the mastership of the Northern Pacific Company, and result in the probable amalgamation of the two companies in violation of the statute; thus endangering the value of the complainant's shares. The relief sought by the complainant was therefore granted to protect his property interests against probable threatened danger. But there, again, the purport of the holding was that, if one railroad corporation acquired a controlling majority of the stock of another railroad corporation, it could operate it, or control its operation, under its own ample franchises and powers to operate railroads. The case is far from sustaining the idea that if a single investor in railroad stocks, whether a natural person or a corporation without railroad franchises, should acquire by purchase a majority or the whole of the stock of both the Northern Pacific Company and the Great Northern Company, that would work any consolidation of those two companies, or that such purchaser would have any power to manage or operate the railroads of both or either of said railroad companies. In the case under consideration the court is careful to note the difference in effect between the purchase of a controlling majority of the stock of a rail- [705] road corporation

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by a rival railroad corporation, which might control, manage and operate it, and a purchase of the same stock by an individual or individuals, though holding whatever amount of stock in the same rival railroad company. The court says:

"Doubtless these stockholders [of the Great Northern Company] could lawfully acquire by individual purchases a majority or even the whole of the stock of the reorganized [Northern Pacific] company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations, with no interests, as such, in common."

I am not able to agree with the suggestion that this expression may be regarded as one not necessary to the decision, and therefore perhaps not carefully considered. On the contrary, it seems to me to be a carefully considered and necessary limitation or explanation of general language elsewhere made use of in that decision.

It follows that as the Northern Securities Company is merely an investor in the stocks of these railroad corporations, not being itself a railroad corporation, and being without franchise, power, or authority to manage, control, or operate any railroad, its ownership of a majority of the stocks of these two railroad companies does not come within the prohibitive language of the statute of 1874. The two companies still remain separate corporations, with no interests, as such, in common. The case would not be different if one natural person with abundant capital should invest in the majority of the stocks of one of these companies, and another like person should invest in the majority of the stocks of the other company. The interest of the two, if they chose to act in harmony, would be the same as the interest of one person owning the whole.

But it is urged that the ownership by the Northern Securities Company of such a large majority of the stock of these two parallel railroads creates a monopoly, having a tendency to prevent competition between these railroads, and presents a case within the mischief intended to be remedied by the statute of 1874, and should be held, even if outside of the language of that statute, to be within the intention of the Legislature which enacted that statute; also that it is contrary to the public policy of the state, which seeks to promote competition between railroads as well as other com-

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mon carriers. The terms "monopolies and trusts" are perhaps, in cases like this, too often employed at the bar to all business enterprises requiring and employing great aggregations of wealth, and in the vague sense in which, at the hustings, they are used to arouse envy and jealousy, forgetting the manifest necessity of such aggregations of wealth to produce the commodities, and their transportation, which our civilization and comfort require. Every railroad corporation is in one sense a monopoly. It has franchises giving rights and powers not common to all citizens. It alone can operate its own railroad, though subject to reasonable regulation by the state. All monopolies, in a strict sense, rest upon some grant by the sovereign power of an exclusive franchise or privilege. And with modern facilities for transportation and communication, all the statutes and learning respecting "forestalling," "regrating," and "engrossing" have become archaic, and even the meaning of those terms will hardly now be recognized. [706] Where a statute like that of 1874, with particular detail, designates parties whom it prohibits from doing specified acts, not otherwise unlawful, to ask a court to extend that statute to parties not named, or to acts not so specified, on the ground that such extension may be conjectured to be within the intention of the Legislature, is an invitation to enter the domain of judicial legislation. The policy of the state appears in its legislation, and, where a policy is made clear by uniform legislation, it has much weight in the interpretation of any doubtful statute. It is clear from several statutes that the policy of the state of Minnesota is opposed to the consolidation of parallel railroads, and to the control by any railroad company of the operation and management of another company's parallel and competing railroad. It is deemed advantageous to the public that at least reasonable competition between such lines of railroad shall continue. While acts of railroad corporations, lessees, purchasers, and managers contrary to this policy are prohibited, there is no statute disclosing any policy as to what parties (other than competing railroad corporations) shall own the stock of any railroad corporation, or of any number of such corporations, or respecting the amount of such stock which any one party

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may own. The bill truthfully states, in substance (paragraph 7), that it has been the settled policy of Minnesota, since its organization as a territory, to develop its resources by the encouragement of railroad building therein, and refers to the many grants of land in aid of railroad construction. As showing the same policy, reference also might be made to very many donations for the like purpose by counties, cities, and towns, under legislative authority. The policy of the state in respect to the operation and management of railroads is disclosed by its statutes; especially by sections 379 to 403, vol. 1, General Statutes of Minnesota of 1894, under the heading of "Railroad and Warehouse Commission," which closely follows the provisions of congressional legislation respecting interstate commerce, and, under clearly specified regulations, places the supervision, oversight, and control of those matters—particularly the rates for transportation—in the hands of the designated state officials. It is plain from these statutes, as construed by the Supreme Court of the state, that it is the policy of the state that the railroads, with their rolling stock and appliances, shall be kept in a high state of safety and efficiency, and that rates of transportation, while kept ample to secure such result, shall always be fair, reasonable, stable, and uniform. Schedules of rates are to be kept publicly posted at every station, and no change or deviation from such published rates is permitted, nor any rebates allowed or advantage to one shipper over another, and no change in such rates is permitted until after 10 days' previous published notice has been given. Under this system shippers can count accurately the cost of transportation as an expense in their business, with the assurance that others engaged in like business must incur exactly the like expense; and untrammelled competition between rival railroads, resulting in rate wars, sporadic struggles for particular contracts or consignments, as well as all rebates, open or secret, all alike unfair or ruinous to carriers and shippers, are prohibited, under penalties, and intended to be entirely eliminated and [707] done away with, leaving as the only bases of competition between rival carriers the furnishing of the better accommodations, and the greater safety and celerity of carriage. All com-

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plaints that published rates are unreasonable are heard and determined by these state officials, who may fix rates binding on the railroads; thus necessarily making rates uniform as between rival railroads. As a result of this policy, and the absolute power of the state officials to fix rates, and keep them at the lowest reasonable figures, competition between rival railroads no longer reduces rates, as it did when railroad companies alone controlled them. On the contrary, where two or more railroads divide the transportation between two places, the necessity of considering greater fixed charges and greater cost of administration and operation may make the reasonable rate for transportation greater than if the whole business could be done, and was in fact done, by one railroad. However that may be, the Northern Securities Company is but an investing stockholder in these two railroad companies, without power to consolidate them or to interfere with the management or control of either. Because of its large holdings of these stocks, it may elect the board of directors of each, who must be composed of entirely different persons. Each board will appoint the officers and control the business and affairs of its own corporation, and will naturally seek to increase its business and property. Neither has any power to control the other nor to contract with the other in restraint of trade. There is no presumption that either will disobey the law, or be guilty of the commission of penal offenses. Should they do these things, then the anti-trust act of Minnesota will be for the first time violated, and the railroad corporations and their offending officials will be amenable to punishment, and to appropriate legal or equitable proceedings.

Decree will be entered dismissing the bill.

[956] ELLIS *v.* INMAN, POULSEN & CO. ET. AL.^a

(Circuit Court, D. Oregon. July 30, 1903.)

[124 Fed., 956.]

MONOPOLIES—ANTI-TRUST LAW—COMBINATION IN RESTRAINT OF INTER-STATE COMMERCE.—A combination between all the lumber manufac-

^a Judgment reversed by Circuit Court of Appeals, Ninth Circuit (131 Fed., 182). See p. 577.

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turers of a city to raise and maintain the price of lumber to local consumers, and to refuse to sell lumber to consumers who purchase any part of their supply from outside mills, some of such mills supplying the local market being situated in another state, is not in violation of the Sherman anti-trust law, as in restraint of interstate commerce, its effect on such commerce being indirect and incidental only.^a

At Law. On demurrer to complaint.

[1957] *Veazie & Freeman*, for plaintiff.

Cake & Cake, for defendant Inman, Poulsen & Co.

Wm. D. Fenton, for other defendants.

BELLINGER, District Judge.

The defendants, comprising all the lumber manufacturers of Portland, have entered into a combination to monopolize the local lumber market, and to advance the price of lumber sold for use within the city. There are a number of outside mills, including two mills at Vancouver, in the state of Washington, convenient to the Portland market, and capable of supplying that market with rough lumber, but without adequate facilities for supplying finished and kiln-dried lumber. In consequence of the high prices charged by the combination, the plaintiff, who is a contractor and builder in Portland, and others similarly situated, purchased rough lumber at the Vancouver mills, and, being under the necessity of having finished and dried lumber, applied to the defendants therefor. The defendants refuse to sell plaintiff lumber of this character unless he will agree to buy hereafter all the lumber required by him for use in the city of Portland of them, and will pay, in addition to their usual prices, the difference between the prices at which plaintiff purchased rough lumber at Vancouver and the prices charged for that kind of lumber by the defendants. The combination in this case is to advance the price of lumber to Portland consumers. It has no reference to the trade in lumber with Vancouver. If this is a wrong, it is a wrong done to such consumers, who are compelled to pay extortionate prices to the monopoly.

^a Syllabus copyrighted, 1903, by West Publishing Co.

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It is not contended that the advance of price in the local market—the thing for which the combination was formed—operates in restraint of the trade in lumber with Vancouver. Such advance has a contrary tendency so far as rough lumber is concerned. And it is not apparent why the defendants, having a particular kind of lumber not obtainable elsewhere, may not refuse to sell such lumber to those who patronize outside mills in the purchase of a part of their supplies, or why the defendants may not discriminate in prices in favor of those who purchase exclusively from them. The tendency of this discrimination is to keep those who are compelled to have finished and dried lumber from purchasing rough lumber at outside mills. Assuming that this operates in restraint of the trade in rough lumber between Vancouver and Portland, it is not such a result as follows directly or immediately from the acts complained of. The discrimination is against all outside mills. A relatively small number of these happen to be located at Vancouver. The remainder are in Oregon, and convenient to the Portland market. Among the Portland purchasers of rough lumber at these outside mills there are some who are consumers of finished and dried lumber. Some of these purchasers of rough lumber resort to the mills at Vancouver, and of these some require finished and dried lumber; and it so happens (but as to this the allegations of the complaint are not definite) that the outside mills, including those at Vancouver, cannot or do not furnish an adequate supply of such lumber; and so we at length reach a point where, through the intervention of special and temporary conditions, [958] the working of the combination tends indirectly to restrain the trade in rough lumber between Vancouver and Portland. It also in the same way tends to create a trade in finished and dried lumber between these points, since there is no reason why the outside mills cannot, in a short time, be prepared to supply the demand for finished and dried as well as rough lumber; and yet the combination cannot be credited, because of this tendency, with being organized in furtherance of such a trade. If the defendants should greatly reduce the price of all kinds of lumber to all purchasers, it would have a tendency to lessen, if it did not destroy,

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the trade in lumber now carried on between Vancouver and Portland, yet they would not be accused in so doing of acting in restraint of that trade. No more can they be said to be so acting within the meaning of the act of congress when they raise the price of lumber to their Portland consumers, or discriminate in the sale of special kinds of lumber in favor of customers who buy exclusively from them.

The demurrer is sustained.

[454] WHITWELL *v.* CONTINENTAL TOBACCO CO.
ET AL.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1903.)

[125 Fed., 454.]

ANTI-TRUST ACT—WHAT CONTRACTS, COMBINATIONS, OR CONSPIRACIES VIOLATE.—Every contract, combination, or conspiracy, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, is in restraint of interstate commerce, and violates section 1 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

SAME—WHAT ACTS, CONTRACTS, AND COMBINATIONS DO NOT VIOLATE.—Acts, contracts, and combinations which promote, or only incidentally or indirectly restrict, competition in commerce among the states, while their main purpose and chief effect are to foster the trade and increase the business of those who make and operate them, are not in restraint of interstate commerce, or violative of section 1 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

[455] **SAME—CONSTRUCTION.**—The anti-trust act should have a reasonable construction—one which tends to advance the remedy it provides, and to abate the mischief at which it was leveled.

SAME—ATTEMPTS TO MONOPOLIZE A PART OF INTERSTATE COMMERCE.—Every attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates section 2 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

SAME.—Attempts to monopolize a part of commerce among the states which promote, or only incidentally or indirectly restrict, competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to be, and were not, made illegal or

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punishable by section 2 of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], because such attempts are indispensable to the existence of any competition in commerce among the states.

SAME—RESTRICTION OF SALES OF GOODS.—A manufacturer, a corporation, and its employé restricted the sales of its products to those who refrained from dealing in the commodities of its competitors by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its competitors so that the purchase of the goods was profitable to them. The plaintiff applied to purchase, but refused to refrain from handling the goods of the corporation's competitors, and sued it for damages caused by the refusal of the defendants to sell their commodities to him at prices which would make it profitable for him to buy them and sell them again. *Held*, the restriction of their own trade by the defendants to those purchasers who declined to deal in the goods of their competitors was not violative of the anti-trust act.

SALES—RESTRICTION—DAMAGES.—The owner of goods may dictate the prices at which he will sell them, and the damages which are caused to an applicant to buy by the refusal of the owner to sell to him at prices which will enable him to resell them at a profit constitute no legal injury, and are not actionable, because they are not the result of any breach of duty or of contract by the owner.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

Dan W. Lawler (*Frank Arnold*, on brief), for plaintiff in error.

C. A. Screrance and *Junius Parker* (*W. W. Fuller*, *F. B. Kellogg*, and *R. E. Olds*, on the brief), for defendants in error.

Before SANBORN, THAYER, and VAN DEVANTER, Circuit Judges.

SANBORN, Circuit Judge.

This is an action by the plaintiff, Joseph P. Whitwell, to recover treble damages from the Continental Tobacco Company, a corporation, and from one of its employés, George E. McHie, under the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], on the sole ground that the defendants refused to sell the manufactured products

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of the tobacco company to him at prices which would enable him to resell them to others at a profit, unless he refrained from buying, selling, or han- [456] dling plug chewing tobacco made by independent manufacturers who were competing with the tobacco company for the trade of the country. All the parties to the suit were engaged in interstate commerce, and the products in question were the subjects thereof. The main question which the case presents is, may one engaged in commerce among the states lawfully select his customers, and sell only to those who do not buy or sell the wares of his competitors, or is such a restriction of his own trade by a manufacturer or merchant and his employés a "contract, combination or conspiracy in restraint of trade" or an "attempt to monopolize any part of trade," within the meaning of the act of July 2, 1890, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] ?

An analysis of the averments of the complaint to which the court below sustained a general demurrer will demonstrate the fact that the crucial question in this case has been correctly stated. The material facts which those averments disclose are these: The plaintiff is a jobber of tobacco, and of the products of tobacco, at St. Paul, Minn. The tobacco company is a manufacturer and merchant, and McHie is its agent and employé. The tobacco company owns and controls most of the valuable and leading brands of plug and chewing tobacco in the United States, and fixes the market prices thereof. The company and its agent, McHie, had long been, and on May 1, 1902, still were, in the practice of selling its goods to jobbers in this way: They allotted to an intending purchaser an amount of its goods which he was required to buy during each succeeding period of four months. This allotment was much in excess of the amount which he would be able to sell during that time. They fixed the prices of the goods comprising the allotment so high that, if the purchaser paid the prices thus fixed, he could not make any profit by buying and selling the commodities. They required each purchaser to refrain from dealing in plug chewing tobaccos made by independent and competing manufac-

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turers. If the purchaser complied with this requirement, they invariably reduced his allotment to the amount he was able to sell, and paid back to him such a percentage of the aggregate price of the goods he bought that the handling of these commodities was by reason of this repayment alone made profitable to him. If the purchaser refused to comply with this requirement, they refused to reduce the amount of his allotment or the prices of his goods, so that the business was unprofitable to him. The plaintiff had long participated in this method of transacting business, had been handling the products of the tobacco company in accordance with it, and had an established business in the purchase of tobacco and its products, and in the sale of them throughout the states of Minnesota, North Dakota, and South Dakota, when on May 1, 1902, the defendants made an allotment to him for the succeeding four months, and offered to furnish their commodities to him in accordance with their established practice. He, however, refused to refrain from handling the goods of independent manufacturers who were competing with the defendants. Thereupon the latter refused to reduce the allotment which they had made to him, or the prices thereof, so that the handling of the goods of the tobacco company would be profitable to the plaintiff, and he did [457] not purchase, or agree to purchase, their goods. He was unable to procure them elsewhere, and sustained damages in the sum of \$280.

No other facts are stated in the complaint. There are, however, allegations that the defendants combined and conspired to regulate and to raise the prices of their goods, and to control the output thereof, with the intent to monopolize trade and commerce among the states of Minnesota and North Dakota and South Dakota; that they combined to arbitrarily fix the prices of their goods, independently of their natural market value, and to refuse to sell them on equal terms to all intending purchasers; and that they did all these things in restraint of trade and commerce among the states. But the only way in which the plaintiff avers that these defendants restrained or attempted to monopolize interstate trade, or disclosed their intent to do so, was by restricting the sale of their own goods to customers who

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refrained from handling the wares of their competitors by making their sales on the terms which have been stated. The general averments of the intent, purpose, and effect of the acts of the defendants may therefore be laid aside here. They serve no purpose save to foreshadow the argument of counsel relative to the legal effect of the facts which the complaint sets forth. They neither state, nor aid in the statement of, any cause of action, because they disclose no fact, and the only question here is whether the facts stated in the complaint constitute a cause of action. The only facts thus stated are that the tobacco company and its employé refused to make sales of its products to the plaintiff, or to others who desired to purchase, on terms that would be profitable to them, unless they refrained from dealing in the goods of its competitors. Was this act, or the course of dealing which it illustrates, a violation of the anti-trust law of 1890? That law provides:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several states, or with foreign nations, is hereby declared to be illegal. * * *

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, * * * shall be deemed guilty of a misdemeanor. * * *"

Under this act, every contract, combination, and conspiracy in restraint of trade among the states is illegal. Every person who engages in any such combination violates this law, and a corporation is a person. Act July 2, 1890, c. 647, §§ 1, 8, 26 Stat. 209, 210 [U. S. Comp. St. 1901, pp. 3200, 3202]. Hence the real question in every case which arises under this law is whether or not the contract, combination, or conspiracy challenged is in restraint of trade among the states. It has now been settled by repeated decisions of the Supreme Court that this question must be tried, not by the intent with which the combination was made, nor by its effect upon traders, producers, or consumers, but by the necessary effect which it has in defeating the purpose of the law. That purpose was to prevent the stifling or substantial restriction of competition, and the test of the legality of a combination under the act which was inspired by this purpose is its direct and necessary effect upon competition in commerce among [458] the states. If its neces-

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sary effect is to stifle or to directly and substantially restrict free competition, it is a contract, combination, or conspiracy in restraint of trade, and it falls under the ban of the law. *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 576, 577, 19 Sup. Ct. 25, 43 L. Ed. 259; *U. S. v. Northern Securities Co.* (C. C.) 120 Fed. 721, 725; *U. S. v. Jellico Mountain Coal & Coke Co.* (C. C.) 46 Fed. 432, 12 L. R. A. 753; *Lowry v. Tile, Mantel & Grate Ass'n* (C. C.) 98 Fed. 817, 826; *Id.* (C. C.) 106 Fed. 40, 45; *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 294, 29 C. C. A. 141, 163, 46 L. R. A. 122; *U. S. v. Coal Dealers Ass'n* (C. C.) 85 Fed. 252; *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610, 619, 53 C. C. A. 256, 265; *Gibbs v. McNeeley*, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152; *Brown v. Jacobs Pharmacy Co.* (Ga.) 41 S. E. 553, 57 L. R. A. 547; *Arnot v. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159.

If, on the other hand, it promotes or but incidentally or indirectly restricts competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation. *Hopkins v. U. S.*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. U. S.*, 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S. Chemical Co. v. Provident Chemical Co.* (C. C.) 64 Fed. 946; *California Steam Navigation Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511; *Smalley v. Greene*, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; *Schwalm v. Holmes*, 49 Cal. 665; *In re Greene* (C. C.) 52 Fed. 104, 115, 116, 117; *In re Grice* (C. C.) 79 Fed. 627, 644; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 7 Sup. Ct. 427, 41 L. Ed. 832; *State v. Goodwill* (W. Va.) 10 S. E. 285, 286, 6 L. R. A. 621, 25 Am. St. Rep. 863; *People v. Gillson*, 109 N.

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Y. 389, 398, 17 N. E. 343, 4 Am. St. Rep. 465; *Butchers' Union Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 755, 4 Sup. Ct. 652, 28 L. Ed. 585; *Welch v. Phelps & Bigelow Windmill Co.* (Tex. Sup.) 36 S. W. 71; *Commonwealth v. Grinstead* (Ky.) 63 S. W. 427; *Walsh v. Dwight* (Sup.) 58 N. Y. Supp. 91, 93; *Brown v. Rounsavell*, 78 Ill. 589; Noyes on Intercorporate Relations, § 388, p. 563.

In *Hopkins v. U. S.*, 171 U. S. 592, 19 Sup. Ct. 45, 43 L. Ed. 290, the Supreme Court said:

"The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. * * * To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act."

[459] And at page 600, 171 U. S., page 48, 19 Sup. Ct., 43 L. Ed. 290, it said:

"The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it. We have no idea that the act covers or was intended to cover such kinds of agreements."

In *Anderson v. U. S.*, 171 U. S. 616, 19 Sup. Ct. 54, 43 L. Ed. 300, the court quoted this sentence from the opinion in *Smith v. Alabama*, 124 U. S. 465, 473, 8 Sup. Ct. 564, 566, 31 L. Ed. 508, "There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations," and then said:

"The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and bona fide purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good. Otherwise there is scarcely an agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to in some obscure way affect that commerce, and to be therefore void."

In *U. S. v. Joint Traffic Ass'n*, 171 U. S. 568, 19 Sup. Ct. 31, 43 L. Ed. 259, the Supreme Court, after reviewing and af-

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firming the case of *Hopkins v. U. S.* and the rule which has been quoted from that case, declared:

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. * * * To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri Case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court."

The right of each competitor to fix the prices of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition. Strike down or stipulate away that right, and competition is not only restricted, but destroyed. Hence agreements of competing railroad companies to intrust their power to fix rates of transportation to the same man or body of men (*U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *U. S. v. Northern Securities Co.* [C. C.] 120 Fed. 721), and contracts of competitors in the production or sale of merchantable commodities to deprive each competitor of the right to fix the prices of his own goods, the terms of the sale, or the customers to whom he shall dispose of them, and either to fix these prices, terms, and customers by the agreement of [460] the competitors, or to intrust the power to dictate them to the same man or body of men (*U. S. v. Jellico Mountain Coal & Coke Co.* [C. C.] 46 Fed. 432, 12 L. R. A. 753; *U. S. v. Coal Dealers' Ass'n* [C. C.] 85 Fed. 252; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; *Chesapeake & O. Fuel Co. v. U. S.*, 115 Fed. 610, 53 C. C. A. 250; *Gibbs v. McNeeley*, 118 Fed. 120, 55 C. C. A. 70, 60 L. R. A. 152; *Lowry v. Tile, Mantel & Grate Ass'n* [C. C.] 98 Fed. 817; *Id.* [C. C.] 106 Fed. 40), necessarily have the effect either to stifle competition entirely, or to directly and substantially restrict it, because such contracts deprive the rivals in trade of

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their best means of instituting and maintaining competition between themselves.

In the contract, combination, or conspiracy which is charged against the defendants in this case there is nothing of this character. The tobacco company is a manufacturer and trader, and McHie is its employé. Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination, or conspiracy in restraint of trade between an employer and his employé, no such contract, combination, or conspiracy between them can be a violation of this law unless it is in restraint of interstate commerce; and the only combination charged against the defendants is their combination to make sales of the commodities of the tobacco company profitable to purchasers to those persons only who refrain from dealing in the wares of their competitors. The two defendants in this case have never been and never intended to be competitors. There has never been any competition, actual or possible, between them, and hence no competition between them is or can be restrained by their combination to conduct the trade of the tobacco company. The contract, combination, or conspiracy charged against them did not restrict competition between them and the independent manufacturers or dealers who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices of their goods and the terms at which they would dispose of them to all intending purchasers.

The tobacco company and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or quasi public service, like railroad and gas corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms upon which it would contract to sell them. Each of them had the right to determine with what persons it would make its contracts of sale. *In re Greene* (C. C.) 52 Fed. 104, 115; *In re Grice* (C. C.) 79 Fed. 627, 644; *Walsh v. Dwight* (Sup.) 58 N. Y. Supp. 91, 93; *Brown v. Rounsavell*, 78 Ill. 589; *Commonwealth v. Grinstead* (Ky.) 63 S. W. 427; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17

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Sup. Ct. 427, 41 L. Ed. 832. There is nothing in the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], which deprived any of these competitors of these rights. If there had been, the law itself would have destroyed competition more effectually than any contracts or combinations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can constitute any restriction upon competition or any restraint upon interstate trade.

The acts of the defendant which are alleged by the complaint in this action to constitute an unlawful restraint upon interstate commerce are nothing more than the lawful exercise of these unquestioned rights which are indispensable to the existence of competition or to the conduct of trade. The tobacco company and its employé fixed the prices of its commodities so high that the plaintiff could not profitably buy them. This was no restriction upon free competition, because it left the rivals of the company free to sell their competing commodities at any price which they elected to charge for them. It would have been no violation of the law under consideration if the tobacco company and its employé had combined to refuse to sell any of its commodities at any price, and to retire from the business in which they were engaged entirely. Much less could it be a violation of this act for them to fix their prices too high for profitable investment by the plaintiff.

The tobacco company and its employé sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering to them goods at lower prices or on better terms than they secured from that company.

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The tobacco company and its employé were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. It had no necessary effect to directly and substantially restrict free competition in any of the products of tobacco, and it did not unlawfully restrain interstate commerce, because it in no way restricted the exercise of the rights of the competitors of the tobacco company to fix the prices of their goods and the terms of their sales of similar products according to the dictates of their respective wills.

It is contended, however, that this selection by the defendants of customers who refrained from selling the goods of their competitors violated section 2 of the anti-trust act, because it was an [462] "attempt to monopolize * * * part of the trade or commerce among the several states." It is admitted that the practice of the defendants was not only an attempt, but a successful attempt, to monopolize a part of this commerce. But is every attempt to monopolize any part of interstate commerce made unlawful and punishable by section 2 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]? If so, no interstate commerce has ever been lawfully conducted since that act became a law, because every sale and every transportation of an article which is the subject of interstate commerce is a successful attempt to monopolize that part of this commerce which concerns that sale or transportation. An attempt by each competitor to monopolize a part of interstate commerce is the very root of all competition therein. Eradicate it, and competition necessarily ceases—dies. Every person engaged in interstate commerce necessarily attempts

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to draw to himself, and to exclude others from, a part of that trade; and, if he may not do this, he may not compete with his rivals, all other persons and corporations must cease to secure for themselves any part of the commerce among the states, and some single corporation or person must be permitted to receive and control it all in one huge monopoly. The purpose of the act of July 2, 1890, was, however, to prevent the stifling of competition, not to destroy it or to foster monopoly, and any construction of any of its provisions which would give it such an effect is unreasonable and inconsistent with the object and spirit of the law. It is an interpretation which fosters the mischief it was passed to remedy, and destroys the remedy provided to abate the evil, while a sound construction would tend to abate the mischief and to promote the remedy. It cannot, therefore, be the true meaning of the second section of this law that every attempt to monopolize any part of interstate commerce is illegal. The act must, as the Supreme Court has twice declared (*Hopkins v. U. S.*, 171 U. S. 578, 600, 19 Sup. Ct. 40, 43 L. Ed. 290; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259), have a reasonable construction. The purpose of the second section is the same as that of the first—to prevent the restriction of competition—and the two sections ought to receive similar interpretations. The Supreme Court has declared that the true construction of the first section is that no contract, combination, or conspiracy is denounced by it unless its necessary effect is to directly and substantially restrict competition in commerce among the states. By a parity of reasoning, the correct interpretation of the second section must be that no attempt to monopolize a part of commerce among the states is made illegal or punishable by the provisions of that section unless the necessary effect of that attempt is to directly and substantially restrict commerce among the states. The acts of the defendants had no such effect. They evidenced nothing but the legitimate efforts of traders to secure for themselves as large a part of interstate trade as possible, while they left their competitors free to do the same. It was not—it could not have been—the purpose or the effect of the second section of this law

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to prohibit or to punish the customary and universal attempts of all manufacturers, merchants, [463] and traders engaged in interstate commerce to monopolize a fair share of it in the necessary conduct and desired enlargement of their trade, while their attempts leave their competitors free to make successful endeavors of the same kind. The acts of the defendants were of this nature, and they did not violate the second section of the law. An attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates the second section of this act. But an attempt to monopolize a part of interstate commerce which promotes, or but indirectly or incidentally restricts, competition therein, while its main purpose and chief effect are to increase the trade and foster the business of those who make it, was not intended to be made, and was not made, illegal by the second section of the act under consideration, because such attempts are indispensable to the existence of any competition in commerce among the states.

There is another reason why the complaint in this action fails to state facts sufficient to constitute a cause of action: The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act or omission of a party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of a contract with, or of a duty to, him. The damages from other acts or omissions form a part of that *damnum absque injuria* for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods to the plaintiff at prices which would make their purchase profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, for the defendants owed him no duty to sell their products to him at any price—much less, at prices so low that he could realize a profit by selling them again to others. The com-

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plaint therefore fails to show that any legal injury or actionable damages were inflicted upon the plaintiff by the acts of the defendants and the judgment below is affirmed.

[593] PHILLIPS v. IOLA PORTLAND CEMENT CO.

• (Circuit Court of Appeals, Eighth Circuit. November 12, 1903.)

[125 Fed., 593.]

ANTI-TRUST ACT—TEST OF VALIDITY OF CONTRACT OR COMBINATION UNDER.—The test of the violation of the anti-trust act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), by a contract or combination, is its effect upon competition in commerce among the states. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law, but if it promotes, or only incidentally or indirectly restricts, competition, while its main purpose and chief effect are to promote the business and increase the trade of the makers, it is not denounced or avoided by that law.

SAME—CONTRACT RESTRICTING TERRITORY WITHIN WHICH PURCHASERS MAY SELL.—A contract of sale by a manufacturer to jobbers of some of its product, to be shipped across state lines to the latter, whereby the parties agree that the purchasers shall not sell, ship, or allow any of the product thus purchased to be shipped, outside of a certain state, is not in restraint of trade or illegal under the act of July 2, 1890.

• (Syllabus by the Court.)

[594] In Error to the Circuit Court of the United States for the Western District of Missouri.

John Charles Harris (*Edward F. Harris*, on the brief), for plaintiff in error.

James C. Williams, for defendant in error.

Before **SANBORN, THAYER, and VAN DEVANTER**, Circuit Judges.

SANBORN, Circuit Judge.

This is a writ of error to review a judgment for the plaintiff below, the Iola Portland Cement Company, a corporation, against Thomas H. Phillips, in an action for damages

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for the breach of a contract of sale of cement. The company was a manufacturer of cement in the state of Kansas. The defendant below, Phillips, was a member of the copartnership of William Parr & Co., who were merchants engaged in business at Galveston, in the state of Texas. On January 24, 1901, Parr & Co. made a contract with the cement company whereby they agreed to purchase of it, during the year 1901, 50,000 barrels of Iola portland cement to be delivered free on board the cars at Iola, in the state of Kansas, and to pay therefor \$1.20 per barrel. They further agreed "not to sell said cement, ship same, or allow same to be shipped," outside of the state of Texas. Under this contract they accepted and paid for 24,580 barrels of the cement, and refused to accept 25,420 barrels thereof. The cement company brought an action against them to recover the damages which it sustained by the failure of the purchasers to accept and pay for these 25,420 barrels, and Phillips, the only defendant served with process, answered that the contract was illegal and void under Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], because it provided that Parr & Co. should not sell the cement, ship it, or allow it to be shipped, without the state of Texas.

It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combina-

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tions and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states. *Hopkins v. U. S.*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. [595] U. S.*, 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; *U. S. v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S. v. Northern Securities Co.* (C. C.) 120 Fed. 721, 725. The application of this rule to the facts of the case in hand leaves no doubt that there was nothing in the contract before us obnoxious to the provisions of the anti-trust law of 1890. The Iola Cement Company had no monopoly of the manufacture or sale of cement in the United States. It was surrounded by competing manufacturers, and the contract which it made with Parr & Co., of Galveston, had no direct or substantial effect upon competition in trade among the states. It left the manufacturers who were competing with the plaintiff for the trade of the country free to select their customers, to fix their prices, and to dictate their terms for the sales of the commodities they offered, so that in this regard no restraint whatever was imposed. If it had the effect to restrain Parr & Co. from using the product which they purchased to compete with other jobbers or manufacturers in the country beyond the limits of the state of Texas, this restriction was not the chief purpose or the main effect of the contract of sale, but a mere indirect and immaterial incident of it. The agreement of sale imposed no direct restriction upon competition in commerce among the states, did not constitute a restraint of that commerce, and was not obnoxious to the provisions of the act of July 2, 1890.

For a more extended consideration of the principles upon which this decision is based, for a citation, review, and analysis of the authorities which sustain them and which compel the ultimate conclusion which we have reached in this case, reference is made to the opinion of this court in *Whitwell v. Continental Tobacco Co.* (which is filed herewith) 125 Fed. 454. A repetition of the citation and review of authorities, and of the more exhaustive discussion of princi-

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ples there indulged in, would be useless here, and it is omitted.

The evidence disclosed the fact that shortly after the expiration of the year within which the defendants had agreed to receive and pay for the cement the plaintiff sold the 25,420 barrels, which the defendants refused to take, for \$1.10 per barrel. The president of the plaintiff testified that the cost of selling this cement was about 10 cents per barrel, that it did not cost any more to sell the cement which had been previously sold to Parr & Co. than it did to sell any other cement, but that the cost of selling any cement was about 10 cents per barrel. The court below instructed the jury that, if they believed that the cost of selling this cement was 10 cents per barrel, they might allow that amount as a part of the damages which the plaintiff was entitled to recover. This instruction is assigned as error. But it was manifestly right. The plaintiff had once incurred and paid the cost of selling the cement in question to Parr & Co., and had obtained a valid contract for its purchase price. Their failure to comply with this agreement imposed upon the plaintiff the necessary expense of making a second sale of that portion of the cement already sold which the defendants refused to accept.

[596] It is assigned as error that the court below refused to admit in evidence a telegram from the president of the Iola company to Parr & Co., dated January 24, 1901, the day of the date of the contract, to the effect that the plaintiff would guaranty a rate of freight of five cents per hundred less than Kansas City rates to all Texas points. But there was no error in this ruling. The telegram was not admissible to establish any agreement to guaranty this rate of freight, and a breach of that agreement as a defense to the action, because no such defense was pleaded. It was not admissible to modify or change the written contract of January 24, 1901, because if it was sent before or at the time that the contract was executed it was merged in that contract and became ineffective, and if it was sent after that contract was made it was not pleaded and had no place in the trial of this case.

Another alleged error specified is that the court below

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refused to admit in evidence a letter from the plaintiff to the defendants, dated February 10, 1902, in which they wrote that they had not done an agency business and requested a proposition. It is contended that this letter was competent to establish the fact that the relation between the plaintiff and the defendants under the contract in suit was that of vendor and vendee, and not that of principal and agent. Conceding that this letter had a tendency to establish that fact, its rejection did not prejudice, and could not have prejudiced, the defendants, because the relation of vendor and vendee was proved by the contract, because the case was tried, and the court charged the jury, and this court has determined the case, upon that theory, and error without prejudice is no ground for reversal.

The judgment below is affirmed.

**[364] UNITED STATES CONSOLIDATED SEEDED
RAISIN CO. v. GRIFFIN & SKELLEY CO.**

(Circuit Court of Appeals, Ninth Circuit. November 9, 1903.)

[126 Fed., 364.]

MONOPOLIES—LEGALITY OF CONTRACTS—LICENSES UNDER PATENTS.—

Contracts by which a number of patents covering similar inventions are conveyed by the several owners to one of the parties, which grants licenses under all to the others, are not void as against public policy, or as in violation of the Sherman anti-trust law, because of provisions intended to protect and keep up the patent monopoly by requiring the licensor to prosecute all infringers, limiting the licenses to be granted to such licensees as shall be agreed on, and imposing conditions on each licensee as to the use and ownership of the patented machines, and prohibiting him from using any others.^{a b}

PATENTS—RIGHTS OF PATENTEE—EFFECT OF STATE LAWS.—Rights acquired under the patent laws of the United States cannot be affected by a state statute.

CONTRACTS—EFFECT OF ILLEGAL PROVISIONS—DIVISIBILITY.—Stipulations in a contract which are invalid as in restraint of trade, if

^a Validity of monopolistic contracts as affected by public policy, see note to *Cravens v. Carter-Crume Co.*, 34 C. C. A. 486.

^b Syllabus copyrighted, 1904, by West Publishing Co.

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capable of being construed divisibly, do not affect the validity of other provisions.

SAME—VALIDITY—WHEN QUESTION FOR JURY.—Conceding that a contract legal in its terms and in its consideration may be rendered illegal as against public policy by reason of the intention of the parties to so use it as to commit civil injury to third persons, where the evidence as to such intention is conflicting the contract cannot be declared illegal by the court as matter of law.

In Error to the Circuit Court of the United States for the Northern District of California.

The plaintiff in error is a corporation created under the laws of New York. Prior to June 26, 1900, it was the owner of two certain patents for machines for seeding and processing raisins. Other persons and corporations at Fresno, Cal., engaged in the raisin-seeding business, owned certain other patents. Litigation had arisen between the owners of these patents. To end this litigation, and to avoid it in the future, an agreement was made on June 26, 1900, between the plaintiff in error, as the party of the first part, and the Forsyth Raisin Process Company, the Forsyth Seeded Raisin Company, the Griffin & Skelley Company, the California Seeding Machine Company, William M. Griffin, Thomas E. Langley, Cary S. Cox, and Lee L. Gray, as parties of the second part. The agreement recites that the party of the first part is the owner of patents numbered 543833 and 543834, and that the parties of the second part own patents numbered 611782, 641938, 641939, 614178, 592131, 602698, 619698, and 679223, and that it is deemed expedient and for the interest of all parties that all of said letters patent be combined for mutual protection and assistance. It thereupon provides, in substance, that the parties of the second part shall assign their various patents to the party of the first part, and that the latter shall use every reasonable effort to defend and protect the several inventions and letters patent in the interest of all, and that it shall grant licenses under said patents, institute and defend suits to protect said inventions and letters patent. The agreement provides further that the royalties which shall be received on license contracts shall, after the deduction of expenses and other charges, as provided for in the agreement, be paid 40 per cent. to the plaintiff in error on [365] account of its patents, 30 per cent. to the Forsyth Raisin Process Company on account of its patent, 20 per cent. to the present owners of letters patent 619698, 6 per cent. to Thomas E. Langley and C. S. Cox, and 4 per cent. to the California Seeding Machine Company. The agreement provides for an appointment of an advisory committee of four members, two to be designated by the party of the first part, and two by the parties of the second part; said committee to have authority to determine to whom licenses shall be granted under the letters patent, the terms and conditions thereof; and it gives the committee power to employ a financial agent, whose duty it shall be to collect and distribute the royalties under such licenses. The agreement makes further provision for the payment of salaries of officers, taxes, and other expenses, makes reference to a suit then pending in the United States Circuit Court for the Northern District of California by the Forsyth Raisin Process Company against A. L. Hobbs & Co. on letters patent 611782, and provides that the same shall be prosecuted without delay at the expense of the

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plaintiff therein. The agreement proceeds to provide that, in case any of the said mentioned letters patent shall be judicially determined to be invalid by a court of last resort, then the share of royalties in the agreement apportioned to and on account of such letters patent shall thereafter not be paid.

The licenses issued under this agreement were all in the one form. They recited that the plaintiff in error, the licensor, is the sole owner of the letters patent referred to in the agreement; and, first, that it grants to the licensee the right to use machines and processes embodied in and covered by said letters patent throughout the United States for the life of said patents; second, that the party of the second part shall pay therefor as license fee one-eighth of one cent for each pound of raisins seeded or processed under said letters patent during the years 1900 and 1901, and thereafter one-fourth of a cent per pound; third, that the licensor shall from time to time lease to the licensee raisin-seeding machines, processes, appliances, fittings, etc., as the same may be required, upon payment of the actual cost of the same, title to such machines, however, to remain in the licensor; fourth, that the licensee "shall use every reasonable endeavor to secure and promote the business of raisin-seeding under this contract, shall neither sublet any of said machines, nor allow any parties, except its own employes, to have possession or control of or to use said machines; shall not use any other raisin-seeding machines during the life of this contract than those furnished by the first party, or with their consent; and shall not buy, sell, nor deal in raisins seeded or treated by any other machines or processes than those of the first party." The fifth provision requires the licensee to keep suitable books of account, open to the inspection of the licensor. The sixth prohibits the licensor from licensing any other party under said letters patent for less royalty or compensation than one-half a cent per pound for raisins seeded under or processed under the said patents, except with the consent of four of certain named of the licensees. The license contract contains the provision that the licensor shall vigorously prosecute infringers of said letters patent, so as to prevent, as far as possible, all unlawful interference with the business and rights of the licensee under and by virtue of the contract.

The plaintiff in error brought an action at law against the defendant in error, alleging that on June 27, 1900, one of the above-mentioned contracts of license was entered into and executed by the said parties; that thereafter, during the years 1900 and 1901, the defendant in error processed about 12,000,000 pounds of raisins, the license fees and rentals for the same, as provided for in said contract, being the sum of \$15,000; that no part of said sum has been paid except \$3,759.42, and that the remainder, \$11,240.58, is due and unpaid. The plaintiff in error, as a second cause of action, alleged that after March 15, 1901, the defendant in error willfully and maliciously, and for the purpose and intent of damaging and injuring the plaintiff in error, failed, refused, and neglected to use every or any reasonable endeavor to secure or promote the business of raisin-seeding under said contract, and did sublet and transfer certain and sundry raisin-seeding and processing machines which it owned and was operating prior to the execution of the contract of June 27, 1900, to other parties, who were not its own employes, and did authorize, permit, and allow such other parties to use the same, and did [366] buy, sell, and deal in raisins seeded and treated by other machines and processes than those of the plaintiff in error, to its injury in the sum of \$10,000. The defendant in error made its answer to this complaint by denying that it was indebted to the plaintiff in error for license fees or rentals or for damages, and alleged as matters of defense, in substance, that on February 25, 1901, the defendant in

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error rescinded its license contract with the plaintiff in error, and gave to it written notice thereof; and as reasons for such rescission alleged that prior to the execution of said contract it was understood and agreed between the defendant in error and the plaintiff in error that a similar contract should be entered into by the plaintiff in error with the Griffin & Skelley Company, Forsyth Seeded Raisin Company, Fresno Home Packing Company, Porter Bros. Company, Fruit Cleaning Company, Golden West Packing Company, and the Co-operative Packers' Association; that by reason of said representation the defendant in error was induced to sign said contract, and otherwise would not have signed the same, but that the plaintiff in error has wholly failed to obtain a contract with the Co-operative Packers' Association. The defendant in error, in its answer, further alleged that at the time of the execution of the contract of June 26, 1900, the plaintiff in error represented that it was the owner of patents numbered 631938 and 631939; that the defendant in error relied on such representation, but that thereafter it learned that the plaintiff in error did not own the said letters patent, or either of them, and on February 25, 1901, it learned that said representations were false, and that the plaintiff in error had not and would not acquire title to the said letters patent, or either of them. The answer further alleged, as ground for rescinding the contract of license, that the plaintiff in error willfully and negligently failed and refused vigorously to prosecute infringers of the letters patent enumerated in the contract of June 26, 1900, and that it did not prevent as far as possible all or any unlawful interference with the business and rights of the defendant in error under said agreement; that by reason of such failure the general public disregarded said letters patent, and without the consent of the plaintiff in error, in opposition to its rights and to the rights of the defendant in error, openly, continuously, and generally used the devices and processes covered by said letters patent without paying license fees or royalty to the plaintiff in error; that a material and chief consideration moving to said defendant in error should protect the defendant in error in its business and rights under said contract, and prevent unlawful interference with such business and rights by persons engaged in such business in competition with the defendant in error; that such consideration has utterly failed; that the plaintiff in error has failed to protect the business and rights of the defendant in error, and has permitted general, continuous, and open use of the patented devices and processes referred to in said contract. Upon these issues the cause was tried before the court and a jury. At the conclusion of the evidence and the arguments of counsel, the court submitted to the jury the decision of the various questions raised upon the issues so presented. After the jury had retired to consider of their verdict, the court recalled them, and gave them a peremptory instruction to find for the defendant in error. In so instructing them the court said: "There are three propositions only in the case, and I think upon either one of them you should find for the defendant. I think the contract is void, first, because it is contrary to a provision of your statute, section 1673, as explained to you. I think it is void because it is in contravention of public policy, because, if carried out to the full extent that it was intended to be, it would have amounted to a monopoly of the business. In the next place, I think it is void because it provided for certain litigation, and I am inclined to think the testimony justifies the belief that that litigation must be pressed, regardless of the rights of other parties, and with a view of oppressing them and driving them out of business. Courts cannot sustain any such contracts."

The evidence on which the court held that the combination contemplated oppressive litigation was the testimony of William Forsyth

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and A. Gartenlaub, Forsyth, who was president of three of the corporations who were parties of the second part to the contract, and attorney in fact for the remainder of the parties of the second part in signing the contract of June 26, 1900, testified [367] that in the negotiations leading up to the contract the plaintiff in error was represented by its secretary, James Williamson, and its treasurer, C. F. Allen. The court drew from the witness the following testimony: "The Court: I do not know whether I got a wrong impression or not, but I want to know what the fact was. What was the understanding as to the prosecution of the holders of other patents? Was it the design of the organization, or the understanding among you, that these prosecutions should be urged for the purpose of wearing them out, or because they were infringers? A. Other patents, you mean; people using the same machines? Q. No, sir; I mean those that were engaged in the business; these outside parties that you expected to close out. A. Both for the purpose of wearing them out and to stop them using the machines. Q. I inferred that, and I wanted to know whether that was a part of the combination. That was a part of this combination? A. Yes, sir." The witness proceeded to refer to litigation pending at that time for infringements of patents held by the plaintiff in error, after which he gave the following testimony: "Q. What was said, if anything, in regard to closing up any other concern, and how did they propose to close them up? A. By bringing suits against them. Q. Suits for what? A. For infringing of patents." A. Gartenlaub, who was in the seeded raisin business at Fresno, and who refused to take a license from the plaintiff in error, testified to a conversation which he had with James Williamson, as follows: "Q. When he said he was going to sue people who did not take out a license, did he give you to understand that he was going to sue for an infringement of some of these patents? A. He said he was going to close them up; he would worry them out of business. Q. Did you not ask him how he was going to close them up? A. I did not. He told me how. He explained to me. Q. Did he not say he was going to bring suits on these patents for infringements? A. He said he owned all the patents, and, the patent litigation being so expensive that you could not defend a suit for less than \$5,000 or \$10,000, that, if he kept on filing five or six suits, he would worry a man out so that he would either close up or take out a license. Q. The suits were for infringement of the patents? A. He did not explain to me how he was going to file his suits." As opposed to this testimony were the depositions of Williamson and Allen, taken in New York before the trial; taken, it is true, on the issues raised on the answer, yet referring in general terms to the negotiations which led up to the contract. Williamson, being asked whether anything was said as to the purpose or objects of the combination, answered: "Nothing further than that the United States Consolidated Seeded Raisin Company was to become the owner of the patents, and, as the owner of the patents, license certain people." Charles F. Allen was asked the following questions: "Q. State whether or not all the representations made by the plaintiff to the defendant—that is to say, such representations as were made to induce them to sign the contract—are contained in the license contract itself which was issued to them. A. Yes, sir. * * * Q. Was it not one of the purposes of the combination that you should get a sufficient number of patents to control the raisin-seeding art? A. No, sir. Q. What was the object in getting together this considerable number of patents? A. Because those who gave their patents did it to stop litigation that we had brought against them." Alfred Nichols, the president of the plaintiff in error, also deposed "that no representations or statements were made by the plaintiff to induce defendant to enter into this

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license contract other than such statements and representations and promises and agreements as were contained in the written document itself." As tending to contradict the testimony of Forsyth and Gartenlaub, other witnesses testified as to the representations made by the plaintiff in error to induce them to join the combination. T. E. Langley testified that Williamson said that they would prevent others who did not take out licenses from operating by bringing suits against them. "Q. What were they to sue them for? What was to be the basis of the suits? A. Infringement of the patents." A. L. Hobbs, who was asked to join the combination, testified that in the representations made to him it was not said that the plaintiff in error would bring suits for anything except what they claimed was an infringement. John Bonner, who declined to join the combination, gave similar testimony.

[368] *John H. Miller*, for plaintiff in error.

Platt & Bayne and *H. H. Welsh*, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The Circuit Court instructed the jury to return a verdict for the defendant in error, holding the contract void on three grounds: First, that it was contrary to public policy, in that it tends to create a monopoly; second, that it is prohibited by the provisions of section 1673 of the Civil Code of the State of California; and, third, that it was contrary to public policy, for the reason that it provided for oppressive litigation. That such a contract is not void as against public policy, in that it tends to create a monopoly, has been decided by the Supreme Court in the case of *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. In that case a contract had been entered into between the National Harrow Company and various other corporations and firms engaged in manufacturing float spring tooth harrows, their frames and attachments, under various patents, 85 in number, which were assigned to the National Harrow Company. That corporation then entered into contracts with the other parties to the agreement, and gave to each a license very similar to the license in question in the present suit. The license provided that the licensee

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should pay a fixed royalty, should make verified reports of its business, and that it should not sell its products manufactured under the license at a lower price or on more favorable terms of payment than was set forth in a schedule which was made a part of the license, except that the licensor reserved the right to reduce the selling price and to reduce the royalty. The licensee agreed that it would not, during the continuance of the license, directly or indirectly engage in the manufacture or sale of any other float spring tooth harrows, etc., than those which it was licensed to manufacture and make under the terms of the license, except such as it might manufacture and furnish another licensee of the National Harrow Company, and then only such constructions thereof as such other licensee should be licensed by the National Harrow Company to manufacture and sell, except such other style and construction as it might be licensed to manufacture and sell by the National Harrow Company. Provision was made for the payment of fixed liquidated damages for breach of certain of the terms of the license, and the licensee agreed not to, directly or indirectly, in any way contest the validity of any patent under which it was licensed to manufacture, or which it might manufacture for another licensee; and it agreed also not to alter or change the construction of the float spring tooth harrow, the frames, etc., which it was authorized to manufacture under the license and under the patents. The licensor covenanted not to grant licenses to any other person or any right to manufacture articles of the peculiar style and construction, or embodying the peculiar features thereof, used by the licensee. It was agreed that the license should continue during [369] the life of the patent or patents applicable thereto, and during the term of any reissue thereof. There were other provisions of the contract not necessary here to be considered. The licensee having violated the contract, suit was brought to recover damages and to restrain further breaches. The licensee, in defense thereof, answered that the license grew out of a combination of the National Harrow Company and other manufacturers and dealers, which amounted to a combination to regulate the manufacture and provide for the

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sale of float spring tooth harrows at fixed prices throughout the United States, and that said combination was void, as in restraint of trade, and a monopoly prohibited by the Sherman act. In the opinion of the court Mr. Justice Peckham said of the patent laws of the United States:

"The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

Concerning the application of the Sherman act to the contract in question, the court said:

"But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. * * *. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article. It is also objected that the agreement of the defendant not to manufacture or sell any other float spring tooth harrow, etc., than those which it had made under its patents before assigning them to the plaintiff, or which it was licensed to manufacture and make under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by the plaintiff, is void under the act of Congress. The plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition in the harrow business more than the patent provided for, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows. It was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others who were engaged in manufacturing and selling other machines under other patents. It would be unreasonable to so construe the provision as to prevent defendant from using any letters patent legally obtained by it and not infringing patents owned by others. This was neither its purpose nor its meaning."

We think the principles announced in that case must control our decision of the question which is here presented, and under its authority we hold that the contract in question in the present case is not void as against public policy, as tending to create a monopoly, or as obnoxious to the provisions of the Sherman anti-trust act.

The principles announced in the case just cited are applicable also to the question whether the contract was prohibited

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by section 1673 [370] of the Code of Civil Procedure of California. That section reads as follows:

"Every contract by which one is restrained from exercising a lawful profession, trade, or business of any kind otherwise than as provided by the next two sections, is to that extent void."

The next two sections referred to have no relevancy to the questions involved in the present case, and need not be quoted. That the provisions of a state law cannot affect rights acquired under a patent of the United States, is too plain to require discussion. In *Columbia Wire Co. v. Freeman Wire Co.* (C. C.) 71 Fed. 302, 306, the court said:

"The entire theory and purpose of our patent laws is to create a limited monopoly. In consideration that a patentee will give his invention to the public, with full drawings and specifications, so as to enable the public to freely use it at the expiration of 17 years, a grant is made to him of an exclusive right to the monopoly of the patented device during that time. The rights so acquired by the patentee under a grant from the United States are entirely inconsistent with the patentee's being made subject to the provisions of the anti-trust laws of the several states."

But, whatever may be the effect of the section of the California statute quoted as regards the contract in question, we hold that it can have no relevancy to any portion thereof except that covenant of the licensee embodied in the fourth provision of the license contract that it shall "neither sublet any of said machines, nor allow any parties, except its own employés, to have possession or control of, or to use said machines; shall not use any other raisin-seeding machines during the life of this contract than those furnished by the first party, or with their consent; and shall not buy, sell, nor deal in raisins seeded or treated by any other machines or processes than those of the first party." If that provision of the contract is, indeed, rendered void by the local statute, none of the questions presented in this case is thereby affected, as that provision is not involved in the litigation. The plaintiff in error sued on two covenants only of the license contract—the covenant to pay a royalty, and the covenant not to sublet the machines. These are valid and subsisting covenants, and are not affected by section 1673, which provides that the contract which contravenes that section is only "to that extent void." In *Oregon Railway & Navigation Co. v. Winsor*, 20 Wall. 64, 70, 22 L. Ed.

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315, the court affirmed the doctrine "that agreements in restraint of trade, whether under seal or not, are divisible; and accordingly it has been held that, when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether."

It remains to be considered whether the original contract of June 26, 1900, is void, or so tainted with inequity that a court will not enforce its provisions, for the reason that it provides for oppressive litigation against third persons. The contract itself contains in its terms no provision for oppressive litigation. It contains a covenant on the part of the plaintiff in error to "institute and defend suits based [§71] upon or concerning the inventions and letters patent above specified, and such others as may hereafter be acquired by it under and by virtue of this agreement." The license contract contained a provision requiring the plaintiff in error to "vigorously prosecute infringers of said letters patent, so as to prevent as far as possible all unlawful interference with the business and rights of said party of the second part under and by virtue of the contract." These are proper provisions, and they are not open to criticism. The ruling of the trial court was based upon certain oral testimony adduced upon the trial. There was no issue raised by the pleadings to which such testimony was applicable. The defendant in error had, it is true, alleged in its answer "that the object of the said combination was not only the purpose aforesaid, but also for the purpose of forcing out of the seeded raisin business the individuals, companies, and corporations who did not unite with the said plaintiff and join with it in its scheme and plan." That purpose, as pleaded in the answer, was not necessarily an illegal one. The answer did not aver that the said alleged purpose was expressed in the terms of the contract of June 26, 1900, or that the contract itself provided in any way for unjust or oppressive litigation. So far from making that allegation, the defendant in error set up in its answer as one of its grounds of defense, and as a reason for rescinding the contract, that

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the plaintiff in error, having promised vigorous prosecution of infringers of said letters patent, failed to perform the promised service. The averment of the answer that one of the unexpressed purposes of the combination was to force out of the seeded raisin business those who did not take licenses thereunder is presumably true, when it is considered that the whole of the new art of seeding raisins by machinery was covered by the patents which were pooled in the combination. The natural result of such a combination would be to force out of business all who did not obtain licenses from the plaintiff in error, for they would necessarily be infringers. The oral evidence which prompted the action of the trial court in withdrawing the case from the jury was the testimony of the president of the defendant in error, who had been an active agent in effecting the combination, that it was the "design of the organization or the understanding," that litigation was to be instituted against those who refused to take licenses, "both for the purpose of wearing them out and because they were infringers." The same witness testified later, however, that it was the purpose to close up such third parties by bringing suit against them "for infringing of patents." There was the testimony, also, of another, who said that Williamson, the secretary of the plaintiff in error, stated to the witness that he was going to close up and wear out of business all who did not take out a license. Admitting that a contract legal in its terms and in its consideration may be rendered illegal, as against public policy, by reason of the intention of the parties thereto at the time of entering into it to so use it as thereby to commit civil injury to third persons, it may nevertheless be doubted whether the mere existence in the minds of some of the contracting parties of such a purpose—a purpose different from the main purpose, and never in fact carried into execution—is, after the contract has been acted upon and acquiesced in *inter partes* [372] for eight months, ground sufficient to justify the denial of any remedy thereon. But, however that may be, we are clearly of the opinion that if, in view of the pleadings and the law applicable thereto, the question of the existence of such an illegal purpose was properly before the court as affecting the legality of the contract, it was,

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under the evidence, a question of fact which should have been submitted to the jury for its decision. There was evidence before the court and jury tending to contradict the evidence that such a purpose existed. There was the testimony of three of the officers of the plaintiff in error taken upon depositions in New York upon the general issues raised by the answer, in which they deposed in substance that the contract itself embodied all of the representations made to induce its execution, and that its objects were fully expressed in its terms. There was the testimony, also, of others who were asked to take out licenses under the contract, who stated that the officers of the plaintiff in error made no representation to them that suits would be brought against others, except on account of infringement of the patents.

The judgment of the lower court is reversed, and the cause remanded for a new trial.

[23] CITY OF ATLANTA *v.* CHATTANOOGA FOUNDRY & PIPEWORKS ET AL.^a

(Circuit Court of Appeals, Sixth Circuit. December 8, 1903.)

[127 Fed., 23.]

MONOPOLIES—ANTI-TRUST ACT—ACTION BY CITY FOR INJURY TO BUSINESS.—A municipal corporation engaged in operating water, lighting, or similar plants, from which a revenue is derived, is, in relation to such matters, a business corporation, and may maintain an action under section 7 of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], for injury to its "business" by reason of a combination or conspiracy in restraint of interstate trade or commerce made unlawful by such act.^b

SAME—LIABILITY OF MEMBERS OF COMBINATION.—Every member of an illegal combination in restraint of interstate trade or commerce in violation of the anti-trust act is liable for the damages resulting to

^a Suit originally brought in the Circuit Court of the United States for the Eastern District of Tennessee, where it was entitled "City of Atlanta *v.* Chattanooga Foundry & Pipe Co." (101 Fed., 900). See p. 11. Judgment reversed by Circuit Court of Appeals, Sixth Circuit (127 Fed., 23). See above. Affirmed by Supreme Court December 3, 1906 (203 U. S., —). Not yet officially reported.

^b Syllabus and statement copyrighted, 1904, by West Publishing Co.

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the business or property of a plaintiff by reason of such combination, and it is immaterial that there were no direct contract relations between plaintiff and defendant.

SAME—INJURY TO BUSINESS.—If the effect of an illegal combination between manufacturers to prevent competition in the sale of a commodity which is a subject of interstate commerce be to enhance the price of such commodity to a purchaser, he is entitled to recover the difference between the price paid and the reasonable price under natural competitive conditions, as an injury to his business, whether such business is interstate or not, provided the transaction by which the purchase was made was interstate.

SAME—ACTION FOR DAMAGES—LIMITATION.—An action under section 7 of the anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), providing that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States * * * and shall recover three-fold the damages by him sustained," is not an action for a penalty or forfeiture, within Rev. St. § 1047 [U. S. Comp. St. 1901, p. 727], prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," but one for the enforcement of a civil remedy given by statute for a private injury, compensatory in its purpose and effect; the recovery permitted in excess of actual damages being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the state in which it is brought.

[24] **SAME—TENNESSEE STATUTE.**—An action under said section based on an alleged excessive price plaintiff was compelled to pay for a manufactured article by reason of a combination between defendants and others to prevent competition and enhance the price of such article in violation of the act is not one for an injury to personal property, within Shannon's Code Tenn. § 4470, which prescribes a limitation of three years for "actions for injuries to personal or real property," but is one to enforce a statute liability, and within section 4473, which prescribes a limitation of ten years for certain actions, and in "all other cases not expressly provided for."

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

See 101 Fed. 900.

This was an action to recover damages under the seventh section of the act of Congress of July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], known as the "Anti-Trust Act." The plaintiff is a municipal corporation of the state of Georgia. The defendants are two manufacturing corporations of the state of Tennessee,

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engaged in the business of making and selling cast-iron pipe and fittings.

The declaration averred that on or about the 28th of December, 1894, the said two companies entered into an unlawful combination for the purpose of restraining interstate trade and commerce with four other corporations engaged in the same line of manufacture, to wit, the Anniston Pipe & Foundry Company, and the Howard-Harrison Iron Company, both corporations of the state of Alabama, and conducting business in that state; the Dennis, Long & Co., a corporation of the state of Kentucky, and carrying on its business in said state; and the Addyston Pipe & Steel Company, a corporation of the state of Ohio, engaged in business at Cincinnati, in that state. The illegal trust agreement complained of is the identical trust which was dissolved by decree of this court in the case reported as *The United States v. The Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, and affirmed by the Supreme Court in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. Reference may be made to the opinions in those cases for the nature and methods of the trust out of which has arisen the present action.

The declaration, in substance, charges that the plaintiff was engaged in conducting a system of waterworks, and that it derived a large revenue from the sale of water to private consumers, the income going into the city treasury; that, for the purposes and uses of its said waterworks business, it bought during the operations of said unlawful trust a large supply of iron water pipe, and that the contract for its supply of such pipe was given to the Anniston Pipe & Foundry Company as the lowest bidder. It is then averred that, by reason of the said unlawful agreement between the said producers of said pipe, all competition was suppressed, and that the said Anniston Company obtained the contract through an arrangement by which it was to be allowed to obtain same at a price agreed upon between said conspirators, without any competition, and that for this privilege it agreed to pay and did pay to the said association a large sum, called a "bonus," which was to be divided between the parties to said arrangement in agreed proportions. It is, in effect, charged that the "bonus" constituted the difference between the fair and reasonable value of the pipe so bought by plaintiff, and the price which it was compelled to pay, and that this large and unreasonable price was extorted from plaintiff through the unlawful suppression of competition, and by the instrumentality of fictitious bids put in by the other parties to said association, so arranged as to create the semblance of competition, and yet secure the contract for the Anniston Company at the price set by the combination as the ostensible lowest bidder. The plaintiff avers that, by reason of the formation of said illegal combination, interstate commerce in cast-iron pipe was restrained, and plaintiff compelled to deal only with the said Anniston Company, and to pay a price agreed upon by the members of the combination, which was unreasonable; that the bonus so paid out of the price [25] paid by plaintiff was paid into a common pocket, and divided among the conspirators in an agreed way; and that the two Tennessee corporations here sued received their due proportion of said bonus according to the terms and plans of the scheme. By all of which the plaintiff avers that it was compelled to pay for the cast-iron pipe so bought and used in its said waterworks \$15,000 more than would have been paid but for the said unlawful trust between the producers of such pipe, and it lays the damage to its business and property at triple the said excess price so paid and reasonable attorneys' fees.

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The defendants plead the general issue of not guilty, and the Tennessee statutes of limitations of one and three years.

Upon the conclusion of all of the evidence, the court instructed the jury to find for the defendants. This has been assigned as error, and this writ sued out by the plaintiff below.

George Westmoreland and *C. P. Goree*, for plaintiff in error.

Frank Spurlock, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The plaintiff's action is to recover damages incurred in its "business or property" by reason of a combination forbidden by the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], known as the "Anti-Trust Act," and its right to a recovery depends wholly upon the seventh section of that law.

It is true that plaintiff is a municipal corporation. Nevertheless it was maintaining a system of waterworks, and furnished water to consumers, charging for same precisely as would a private corporation engaged in a like business. That a municipal corporation may be empowered to engage in the business of furnishing water or gas, or in the operation of street railways, as well as many other quasi public occupations, must be conceded. That the profit resulting inures to the public does not alter the fact that when thus engaged it is pro hac vice a business corporation. If its "business" as a corporation engaged in the occupation of supplying water for a consideration has been injured by the unlawful combination complained of, it is just as much entitled to maintain this suit as a private corporation engaged in a like occupation. That it was not engaged in an interstate water business is true. But if it has no standing to recover damages for an injury to its "business," it is not easy to see how it has any better standing to recover for an injury to its "property." That there was evidence tending to show that the plaintiff had been compelled to pay an unreasonable price for the pipe which it bought during the continuance of the unlawful combination complained of is not to be disputed. That its purchases were made exclusively from the Anniston Pipe Com-

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pany, a corporation doing business in Alabama, and that it is not suing that corporation, is of no vital significance. The Alabama company and the two Tennessee companies which are sued were members of an association which included practically every pipe manufacturing concern in a situation to compete for the business of the plaintiff. The evidence also tended to show that the object of the combination was to prevent any other producer of such pipe from competing with the Anniston Company for plaintiff's business, and that practices were adopted intended to compel [26] it to deal exclusively with the Alabama member of the association, and to pay a price settled by the combination in advance of any bidding. For this privilege the Alabama corporation agreed to pay a large sum into the pool treasury, called a "bonus," which was to be divided among the confederates in agreed proportions. An appearance of competition was to be maintained by bids put in by the other associates, every such bid being higher than the bid to be made by the company to whom the contract had been assigned. There was to be no chance for any other person to secure a contract with the plaintiff than that member of the combine selected in advance of the open biddings.

Mr. Justice Peckham, in *Addyston Pipe Co. v. United States*, 175 U. S. 211, 243, 20 Sup. Ct. 96, 108, 44 L. Ed. 136, where this very combination was under consideration, speaking for the court of the results of the agreement between the corporations who were members of this trust, said:

"The combination thus had a direct, immediate, and intended relation to, and effect upon, the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction the resulting high prices for the pipe would not have been obtained. It is useless for the defendants to say that they did not intend to regulate or affect interstate commerce. They intended to make the very combination and agreement which they in fact did make, and they must be held to have intended (if in such case intention is of the least importance) the necessary and direct result of their agreement."

Undoubtedly it was not competent for the Congress to regulate by legislation commerce which is purely intrastate, and this limitation was recognized in *Addyston Pipe Co. v. United States*, where the court said:

"In regard to such of these defendants as might reside and carry on business in the same state where the pipe provided for in any particu-

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lar contract was to be delivered, the sale, transportation, and delivery of the pipe by them under that contract would be a transaction wholly within the state, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some nonresident of the state eventually obtained it."

The direct intention and effect of the combination was to limit and restrict the right of each of the several companies to compete for business with Atlanta, as well as to enhance the price of the commodity which was the subject of the agreement.

We have, then, a direct action by this plaintiff against two of the members of this unlawful combine. That there was no purchase made direct from either of them is of no importance. Their guilt is as great as that of the Alabama corporation from whom the plaintiff did buy its pipe. If the agreement between the defendants and their associates was unlawful and tortious, each is responsible for the torts committed in the course of the illegal combination. These defendants have themselves participated in the benefits resulting from the bonus paid by the Alabama member of the association, and have no ground to complain that they have been alone sued. *Stockwell v. U. S.*, 13 Wall. 351, 20 L. Ed. 491; *Van Horn v. Van Horn*, 52 N. J. Law, 286, 20 Atl. 485, 10 L. R. A. 184; *Robertson v. Parks*, 76 Md. 118, 135, 24 Atl. 411.

[27] Replying to the argument that if the combination did not prevent any particular contract that it had not restrained trade, Justice Peckham, in *Addyston Pipe Co. v. United States*, 175 U. S. 245, 20 Sup. Ct. 109, 44 L. Ed. 136, said:

"It is not material that the combination did not prevent the letting of any particular contract. Such was not its purpose. On the contrary, the more contracts to be let, the better for the combination. It was formed, not for the object of preventing the letting of contracts, but to restrain the parties to it from competing for contracts, and thereby to enhance the prices to be obtained for the pipe dealt in by those parties. * * * The question is as to the effect of such combination upon the trade in the article; and if that effect be to destroy competition, and thus advance the price, the combination is one in restraint of trade."

If, then, the price of a commodity which is the subject of an interstate contract be unlawfully enhanced by a combination for the purpose of suppressing competition, shall the vendee thus compelled to pay this unlawfully enhanced price

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be without remedy against the combination because he may happen not to be engaged in the conduct of an interstate business? If the effect of a combination to enhance the price of a commodity which is the subject of interstate commerce be to restrain such commerce, within the meaning of the law of Congress, by reason of its tendency to affect the volume of such trade, then the effect upon the business of one who has paid the enhanced price, in an interstate transaction, must be to correspondingly affect the volume or profit of that business. The difference between what he was thus compelled to pay and the reasonable price of the commodity under natural competitive conditions would be an injury to that business directly resulting from such unlawful combination. The injury to his business, whether it be in its volume or profit, is the same whether that business be inter or intra state—whether he buy to extend his plant, or to sell again in an interstate business. This excessive price is the expected and intended result of the unlawful combination to restrain interstate trade in that commodity. That such a plaintiff is entitled to recover the damages thus sustained in his business, whatever its character, would seem to be the plain purpose of the seventh section of the law of Congress, under the logic of the decision in *Addyston Pipe Co. v. United States*. It is possible to so construe this seventh section as to devitalize this section by confining compensatory relief to such persons as shall sustain an injury in some interstate business whose volume or profit has been diminished. But this construction does not seem consistent with the wide economic purposes of Congress, as manifested by the whole tenor of the act. Congress evidently foresaw the wholesome effect of pecuniary responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to encourage disregard of the law. The act gives the remedy to "any person" "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act." If Congress had the power to declare unlawful a combination which was intended to restrain interstate commerce by en-

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hancing the value of a commodity when the subject of interstate commerce, it had the power to give a [28] compensatory remedy to any person directly affected by the unlawful agreement.

We see no application of the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, to the case at bar. Undoubtedly the contract of purchase and sale of pipe was a contract wholly collateral to the unlawful trust agreement between the makers of such pipe, and the vendor could make out a case for the purchase price without reliance upon the unlawful agreement between such makers. The contract of bargain and sale between the Anniston Pipe Company and the plaintiff was therefore a valid and enforceable agreement, and the plaintiff could not defend a suit for the price by showing that the seller was a partner in an illegal association. The court in that case did decide that the damages recoverable under the seventh section were recoverable only in a direct action, and could not be set off in a suit under a contract for the price. But this was based, not upon any construction of that section, but upon the general principle of law which forbids the setting off of unliquidated damages not directly growing out of the principal transaction. The present suit is a direct action, and is therefore unaffected by anything decided in that case.

This brings us to the question of the limitation applicable to the suit. Under the evidence, it was very plain that plaintiff's right of action accrued more than three and less than five years before action commenced. The anti-trust act provides no limitation, and, if any has been prescribed by federal law, it is that found in section 1047, Rev. St. [U. S. Comp. St. 1901, p. 727], which provides that "no suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," shall be maintained unless commenced within five years from accrual of penalty or forfeiture. If this is an action to recover a penalty, within the meaning of this statute, the suit was in time. The shorter statute of the state, limiting the time for the commencement of suits for statutory penalties to one year, would have no application to a suit for a penalty under an act of Congress. It is only when there is no

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federal statute that the limitation prescribed by the law of the state is applicable. *Campbell v. Haverhill*, 155 U. S. 610, 614, 15 Sup. Ct. 217, 39 L. Ed. 280; *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109.

We find ourselves in agreement with the court below in holding that an action under the seventh section of the act of July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202], is not a penal action. The three first sections of the act are undoubtedly penal. They forbid certain contracts and combinations, and provide that persons doing any of the forbidden things shall be guilty of a misdemeanor, and subject to punishment by both fine and imprisonment. The fourth and fifth sections give jurisdiction to the Circuit Courts to prevent and restrain violations of the act, and deal with procedure under the restraining power thus granted. The sixth section provides for the forfeiture to the United States of property in course of transportation owned by any such unlawful combination, etc. The seventh section alone gives any remedy to one injured by such a [29] forbidden combination or contract, and that measures the relief by the "damages by him sustained," costs of suit, and his reasonable attorney's fees. The remedy is not given to the public, for no one may bring the action save the person "who shall be injured," etc., and the recovery is for the sole benefit of the person so injured and suing. It is not reasonable to construe the remedy so conferred as a penal action, for that would be to add to the punishment by fine or imprisonment imposed by the other sections of the act an additional punishment by way of pecuniary penalty. The plain intent is to compensate the person injured. True, the compensation is to be three times the damage sustained. But this enlargement of compensation is not enough to constitute the action a penal action, within the meaning of section 1047, Rev. St. [U. S. Comp. St. 1901, p. 727]. Thus in *Goodridge v. Rogers*, 22 Pick. 495, and *Adams v. Palmer*, 6 Gray, 338, the action was for a tort for entering upon land and committing trespass, and was brought under a statute which gave to the plaintiff threefold damages. It was nevertheless held not to be an action for a statute penalty, so as to

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bring it under a statute which barred all actions and suits for penalties and forfeitures within one year. In suits for the infringement of patents, judgment for threefold the actual damages may be rendered, but suits under the statute have never been regarded as penal actions. *Campbell v. Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 280. In *Woodward v. Alston*, 12 Heisk. 581, an action against a clerk for fees illegally collected was held not to be a penal action, although called a "penalty" in the statute giving the particular remedy. In *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109, the suit was under section 4966, Rev. St. [U. S. Comp. St. 1901, p. 3415], providing that one publicly presenting a copyrighted dramatic performance, without the owner's consent, shall be liable for all damages, "to be assessed at such sum, not less than one hundred and fifty dollars for the first, and fifty dollars for every subsequent performance as to the court may seem just." The suit was held not to be a suit for the recovery of a penalty or forfeiture.

The whole subject of penal and compensatory actions has been so thoroughly considered in *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, and *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109, as well as by the very full and able opinion of Judge Clark in the court below in disposing of a demurrer to a plea, that we feel we can add nothing to the subject.

The limitation applied by the court below was that prescribed by section 4470, Shannon's Revision, Tenn. Code. Prior to the Tennessee Code of 1858 the statute of limitations operated upon the remedy, and applied to the form of action. By the Code then adopted, and its amendments, the limitation now applies to the cause of action. *Kirkman v. Phillips' Heirs*, 7 Heisk. 222; *Callaway v. McMillian*, 11 Heisk. 557. The limitations of actions other than real are found in sections 4466 to 4483 inclusive, Shannon's Code. Section 4466 provides that:

"All civil actions, other than those for causes embraced in the foregoing article, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided."

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[30] Section 4469, among other things, prescribes that actions for "statute penalties" shall be brought within one year.

Sections 4470, 4472, and 4473 must come under consideration, and are here below set out in full:

"Sec. 4470. Actions for injuries to personal or real property; actions for the detention or conversion of personal property within three years from the accruing of the cause of action."

"Sec. 4472. Actions for the use and occupation of land and for rent; actions against the sureties of guardians, executors and administrators, sheriffs, clerks and other public officers, for nonfeasance, misfeasance and malfeasance in office; actions on contracts not otherwise expressly provided for, within six years after the cause of action accrued."

"Sec. 4473. Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments and decrees of courts of record of this or any other state or government, and all other cases not expressly provided for, within ten years after the cause of action accrued."

The learned trial judge held this action to be one for an injury to property, within the meaning of section 4470, and therefore barred in three years. To this we cannot assent. That section plainly applies only to causes of action arising out of some injury to property, as distinguished from its detention or conversion. Property, either personal or real, may be injured or damaged without its being either detained or converted. But whether the cause of action be an injury or damage to the property, or for its taking or detention, the suit must be brought within the same period. This distinction between the two kinds of injury to tangible personal property is of very ancient origin. Sir William Blackstone (volume 3, 145, 153), in his chapter entitled "Of Injuries to Personal Property," says:

"The rights of personal property in possession are liable to two species of injuries—the amotion or deprivation of that possession, and the abuse or damage of the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches—the unjust and unlawful taking them away, and the unjust detaining them, though the original taking might be lawful."

Touching injuries to property, as distinguished from its taking or detention, the same author says:

"As to the damage that may be offered to things personal while in the possession of the owner, as hunting a man's deer, shooting his dogs, poisoning his cattle, or in any wise taking from the value of any of his chattels, or making them in a worse condition than before, these are injuries too obvious to need explanation. I have only,

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therefore, to mention the remedies given by the law to redress them, which are in two shapes: By action of trespass *vi et armis*, where the act is in itself immediately injurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action on the case, where the act is in itself indifferent, and the injury only consequential, and therefore arising without any breach of the peace. In both of which suits the plaintiff shall recover damages in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction, for the action will lie against the master as well as the servant. And if a man keeps a dog or other brute animal used to do mischief, as by worrying sheep or the like, the owner must answer for the consequences, if he knows of such evil habit."

We find in the very carefully selected verbiage of section 4470 a recognition of the two kinds of injury to which tangible property is [31] susceptible—one by a damage which does not affect the possession, and the other by a taking or detention which does.

While the precise question has not been decided by the Supreme Court of Tennessee, we do find an indisposition to give to the section any such broad and indeterminate meaning as would include a suit which does not involve any actual injury to property. Thus this section was held not to apply to a suit against an attorney for the negligent loss of a debt intrusted to him for collection. *Bruce v. Baxter*, 7 Lea, 477; *Ramsey v. Temple*, 3 Lea, 253. Nor to the suit of a stockholder, in behalf of the corporation, against bank directors, for the negligent discharge of their duties, by which the corporation had sustained losses. *Wallace v. Lincoln Savings Bank*, 89 Tenn. 631, 15 S. W. 448, 24 Am. St. Rep. 625.

In *Kirkman v. Philips' Heirs*, 7 Heisk. 222, 225, the court said: "The statute of limitations applicable depends upon the nature and character of the action, and not upon its form." In the same case it was held that, although the forms of action have been abolished by the Code, an owner of personal property, whose right to sue for damages for its conversion was barred by the statute of three years, might waive the tort, and sue for the value upon the implied assumpsit, in which case his suit would not be barred in six years; that being the time within which a suit upon a contract might be brought. See, also, *Alsbrook v. Hathaway*, 3 Sneed. 454. Actions on statute liabilities, not being a statute penalty, and not dependent upon any contract, ex-

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press or implied, are actions not otherwise "expressly provided for by any of the other sections of the chapter upon the limitations of actions other than real." Such an action is at the common law—one in the nature of an action upon a specialty—and is of a similar kind to those enumerated in section 4473, Shannon's Code. Under the statute of 21 James I, c. 16, all actions "upon the case," with certain exceptions, and "all actions of debt grounded upon any lending or contract without specialty," were barred unless commenced within the time named in the statute. But an action of debt which was grounded upon a specialty was not within the statute. Specialties were not within the evil intended. Angell on Limitations, § 80; *Jones v. Pope*, 1 Saunders, 38; *White v. Parkin*, 12 East, 578; Browne on Actions at Law, 345; *Bullard v. Bell*, 1 Mason, 243, Fed. Cas. No. 2121; 4 Bacon, Abridgment, 471. But the statute of James operated upon the form of action. Thus all actions "upon the case," whatever the cause of action, were within the bar of the statute, and so were "all actions of debt grounded upon any lending or contract without specialty."

In *Carrol v. Green*, 92 U. S. 509, 23 L. Ed. 738, it was held that a suit by creditors of a corporation to enforce their claims against stockholders under a clause of the charter rendering them individually liable was barred by the South Carolina statute; being, in substance, the act of 21 James I, c. 16. The reason given for this result was that the charter was a mere offer or proposal by the state, which the stockholders could accept or reject, and that by taking stock they assented to the liability imposed, and that the assent thus given and promise implied was the ground of liability, and that the action of case would lie upon such an implied promise, which action was within [32] the bar of the statute. The court, however, went further, and held that the action or suit was not on the statute, and was therefore not an action on a specialty. "The statute," said the court, "was only inducement. The implied promise of the stockholders to fulfill its requirements was the agreement on their part, and it was without specialty." The distinctions made in the case are quite refined, and turn upon common-law forms of action. So far as the case goes upon the ground that

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the charter involved a mere proposal, and that the liability of the shareholder was grounded upon his implied agreement, it is in accord with the great current of authority.

The statute of James, as amended by Act N. C. 1715, c. 21, was in force in Tennessee until adoption of the Tennessee Code of 1858. Act N. C. 1715, c. 31, Scott's Revisal, vol. 1; *Pea v. Waggoner*, 5 Hayw. 19; *Tisdale v. Munroe*, 3 Yerg. 320. By the Code, the statutes no longer operate upon the form, but upon the cause, of action; and, by section 4473, every cause of action not otherwise expressly provided for is barred, without regard to whether it be upon a specialty or not.

It is impossible, having any regard to the verity of things, to conceive how any action would lie, under the seventh section of the anti-trust act, upon any implied agreement of the defendants to compensate the plaintiff for the injury to its business and property. But if we could torture an implied agreement out of the transaction, the defendants would not be in better plight, for, if the cause of action be a contract, express or implied, the action would not be barred for six years. Shannon's Code, § 4472. We are, however, of opinion that this is an action on a statute liability, and that the cause of action does not arise out of any agreement, and that such an action is not barred for ten years.

The third and fourth pleas were bad, and the demurrer to them should have been sustained. The direction to find a verdict for the defendants was also error.

The judgment will be reversed, with directions to grant a new trial.

[804] ROBINSON *v.* SUBURBAN BRICK CO.

(Circuit Court of Appeals, Fourth Circuit. February 2, 1904.)

[127 Fed., 804.]

FEDERAL COURTS—JURISDICTION ^a—ALLEGATION OF AMOUNT IN CONTROVERSY.—It is not essential that a bill in a federal court should state the amount or value in controversy, if it appears to be within

^a Jurisdiction of Circuit Courts as determined by amount in controversy. see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.

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the jurisdictional limit, from the allegations of the bill, or otherwise from the record, or from evidence taken in the case before the hearing of objections to the jurisdiction.

CONTRACTS IN PARTIAL RESTRAINT OF TRADE—VALIDITY^a—**SALE OF GOOD WILL**—A covenant in a contract by which the owners of brickmaking plants conveyed them to a corporation in exchange for its stock, binding the sellers not to engage in competing business within a radius of 50 miles from the place of business of the corporation for a term of 10 years, is valid, and may be enforced in a court of equity by a suit to enjoin its violation.

SAME—LAW GOVERNING—Such a covenant is personal, and is not brought within the statutes of a state other than that in which the contract was made by the fact that the property sold was situated in such state.

MONOPOLIES—ANTI-TRUST ACT—MANUFACTURING COMBINATION—The anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), does not apply to a contract or combination relating to the business of manufacturing within a state.

ABATEMENT^b—**PENDENCY OF ACTION IN STATE COURT**—The pendency of a suit in a state court is not a bar to one on the same cause of action in a federal court.^c

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Wheeling.

Henry M. Russell and *J. B. Driggs*, for appellant.

Nelson C. Hubbard (*Hubbard & Hubbard*, on briefs), for appellee.

Before **GOFF** and **SIMONTON**, Circuit Judges, and **McDOWELL**, District Judge.

SIMONTON, Circuit Judge.

This case comes up on appeal from the Circuit Court of the United States for the Northern District of West Virginia. It has been twice argued in this court. In the year 1898 George O. Robinson, the appellant here, was engaged in the business of manufacturing brick in the town of Bellaire, in the state of Ohio. At the same time George K. Wheat was engaged in the same business in or near the city

^a Validity of monopolistic contracts, as affected by public policy, see notes to *Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 9 C. C. A. 686; *Cravens v. Carter-Crume Co.*, 34 C. C. A. 486.

^b See Abatement and Revival, vol. 1, Cent. Dig. § 87.

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of Wheeling, W. Va. The Belmont Brick & Tile Company had a manufactory at Martin's Ferry, in the state of Ohio. B. F. Hodgman was conducting the manufacture of brick at [805] Moundsville, W. Va. The owners of these factories entered into an agreement on 24th December, 1898, whereby they all agreed to sell and convey their several plants to a corporation to be organized under the laws of West Virginia, which would have its principal place of business at Wheeling. They were each to receive, in payment for the plant, specified amounts of stock in the new company. The agreement contained the following stipulation:

"It is mutually agreed between the parties hereto, and each for himself specifically promises and agrees, not to hereafter engage in the brickmaking business, or in any lines that may be manufactured hereafter at any of the several plants to be operated by the corporation whose creation is here contemplated, or to furnish means, aid or advice to others seeking to do so in such a way as to come in competition with the said corporation within a territory which may be described as within a radius of 50 miles from the city of Wheeling, W. Va., within a period of ten years from and after the signing of this agreement."

The agreement was carried out, and the property exchanged for the stock in the new company called the Suburban Brick Company. George O. Robinson took an active part in the management and control of the new company for some time. He afterwards sold out all his interest, and then ceased to have anything to do in the business of the company. Very soon thereafter he became a stockholder in the Standard Brick & Stone Company, a corporation organized under the laws of Ohio, and engaged in manufacturing brick substantially the same as that of the Suburban Brick Company, at Bellaire, Ohio, within 10 miles of Wheeling.

The bill in this case is filed by the Suburban Brick Company against George O. Robinson in order to compel the specific performance of his contract as above set forth. It states the facts above set out, and prays that the defendant, George O. Robinson, be enjoined from prosecuting the business of brickmaking as manager or adviser of the Standard Brick & Stone Company, or of any others who may seek to engage in business within the said territory.

The answer did not deny the execution of the agreement set out in the bill, nor the violation of it by the defendant.

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It justifies the breach of the agreement; insisting that it was unlawful and invalid under the laws of the state of Ohio, under the trust laws of the United States, at common law, and against the principles of equity. The answer also set up the pendency of a suit between the same parties in a court of Ohio, involving the same question as is involved in this case.

With this answer the defendant also filed a demurrer:

"(1) The said bill is defective, in that it does not allege facts showing that this court has jurisdiction of this cause, nor are such facts otherwise shown by the record. (2) The agreement set forth in the said bill is void, by reason of the laws of the state of Ohio, and also by reason of the acts of Congress of the United States; and, except by virtue of the said agreement, the plaintiff shows no right to relief. (3) The facts stated in the bill do not present a case in which a court of equity has jurisdiction, even if the agreement were valid, to award an injunction or to grant the relief prayed for. (4) The said bill is in other respects uncertain, informal, and erroneous."

At the hearing, all the evidence having been taken and submitted, the court below overruled the demurrer. The second, third, and fourth grounds of demurrer are clearly superseded by the answer. The first [806] ground of demurrer, based upon the failure of complainant to state in so many words that the matter in controversy exceeded \$2,000, besides interest and costs, was overruled; the court holding that it may be determined from the evidence herein that the amount in controversy exceeds the required jurisdictional amount. The decree, on bill, answer, and evidence, granted complainant the relief asked, and ordered the injunction to issue, to remain in force until 24th December, 1908, the date fixed by the agreement in the record.

Leave to appeal was granted the defendant, and the case is here on assignments of error as follows:

"(1) The said decree is erroneous in overruling and refusing to sustain the defendant's demurrer to the bill in the said suit. (2) The said decree is erroneous in awarding the injunction against the said defendant which is thereby awarded and decreed. (3) The said decree is erroneous in granting the plaintiff the relief prayed for instead of refusing such relief and dismissing the plaintiff's bill."

As to the demurrer: It is not essentially necessary that the bill should state the amount of the matter in controversy, if this fact is either manifest from the allegations of the bill, or it be made to appear in any part of the record. The

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courts go farther than this, and permit this jurisdictional fact to be established by affidavits, if it appears in no part of the record. *Carr v. Fife*, 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508; *United States v. Trans-Missouri Freight Association*, 166 U. S. 311, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Whiteside v. Haselton*, 110 U. S. 296, 4 Sup. Ct. 1, 28 L. Ed. 152; *Wilson v. Blair*, 119 U. S. 387, 7 Sup. Ct. 230, 30 L. Ed. 441; *Red River Cattle Co. v. Needham*, 137 U. S. 632, 11 Sup. Ct. 208, 34 L. Ed. 799. And in *Rector v. Lipscomb*, 141 U. S. 557, 12 Sup. Ct. 83, 35 L. Ed. 857, the court, notwithstanding allegations in the record, went into the testimony, and, under all the showing presented, held that the matter in controversy was not within the jurisdictional limit. In the case at bar the testimony showed that the threatened damage from the act of the defendant amounted to many thousands of dollars.

As to the merits: It is charged that this contract sought to be enforced is in restraint of trade and void. Contracts of this character, whereby a party binds himself not to carry on a particular business within a limited territory and for a limited time, have always been sustained by courts, especially if the contract accompanies, as a part of the consideration thereof, a sale by a vendor to a vendee. The rule is clearly stated by Mr. Pomeroy in his *Equity Jurisprudence* (volume 2, 443, 444):

"Contracts in partial restraint of trade are valid. To this end, they must be partial with respect to the territory included; reasonable with respect to the amount of territory, the circumstances and rights of the party burdened, and the one benefited by the restriction, and the number and interests of the public whose freedom of trade is circumscribed; and made upon a valuable and sufficient consideration. The jurisdiction of equity is generally exercised, in respect to these contracts, for the purpose of indirectly compelling their specific performance, by means of an injunction preventing their violation. Such contracts are frequently made in connection with a sale of a business and good will; the vendor stipulating that he will not carry on the same business within a specified distance from the old place, or for a specified time, or will not solicit the old customers for their trade, and the like. These kind of stipulations, [807] if reasonable as to territory and time, will be enforced against the vendor, often by an injunction."

This seems to be the law of Ohio. "Restraint of trade, founded on good consideration, reasonable, and not oppressive, is valid." *Lange v. Werk*, 2 Ohio St. 519; *Grasselli v. Lowden*, 11 Ohio St. 349. "A restriction as to one city for

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five years is valid." *Thomas v. Miles' Adm'r*, 3 Ohio St. 274. So in North Carolina. *Kramer v. Old*, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650: "Good will is property which the owner has the right to sell to the full extent of the field from which he derives his profit, and for a reasonable time. Its market value is lessened if he cannot bind himself not to compete. The space limit may be enough to secure to the buyer the full benefit of the business he has bought." In the Federal courts the same principle prevails. *Oregon S. Nav. Co. v. Winsor*, 20 Wall. 69, 22 L. Ed. 315: "Restraint is invalid at common law, except when it is ancillary to a lawful contract, involving relations of vendor and vendee, and necessary to protect the covenantee in the lawful fruits of his contract." *U. S. v. Addyston Pipe Line Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; *Hitchcock v. Anthony*, 83 Fed. 779, 28 C. C. A. 80.

It is suggested that this contract is invalid under the laws of Ohio, especially as it involves the purchase of land in Ohio. But the question we are considering is not the validity or invalidity of the purchase of defendant's land. He nowhere seeks a rescission of that sale. Nor has he offered to return the consideration received by him on its purchase. On the contrary, he retains it. The question before us is a personal covenant by defendant with complainant, made in West Virginia, to be construed and enforced according to the law of West Virginia. There is no question of its validity under the law of West Virginia.

It is also urged that this transaction is void under the "act to protect trade and commerce against unlawful restraints and monopolies." Act July 2, 1890, c. 647, 26 Stat. p. 209 [U. S. Comp. St. 1901, p. 3200]. But this statute is intended to protect interstate trade and commerce, and does not relate to manufactories within a state. *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; illustrated in *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 237, 20 Sup. Ct. 96, 44 L. Ed. 136. The doctrine is well stated in *Gibbs v. McNeeley*, 107 Fed. 211:

"Manufacture within a state of an article of commerce is not within the purview of the act, although the manufacturing combination constitutes a monopoly. * * * It makes no difference that the manufacturer intends his product for sale in other states and foreign

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countries. * * * It must go further, and provide for the sale and transportation to other states; otherwise what is proposed cannot be said to look to interstate commerce."

The pendency of the suit in the court of Ohio cannot affect the suit in the Circuit Court of the United States. *Gordon v. Gilfoil*, 99 U. S. 168, 25 L. Ed. 383; *Stanton v. Embry*, 93 U. S. 548, 23 L. Ed. 983. See, also, *Anderson v. U. S.*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300.

From a consideration of the whole case, we are satisfied with the conclusion reached by the court below. The decree is affirmed.

[875] A. BOOTH & CO. *v.* DAVIS ET AL.^a

(Circuit Court, E. D. Michigan, S. D. January 19, 1904.)

[127 Fed., 875.]

MONOPOLIES—ANTI-TRUST ACT—SCOPE.—The Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) has no application to a contract by which the stockholders of a corporation engaged in dealing in fish at different places, in consideration of the purchase of the business and good will of the company by another, agreed not to enter into competition with him in such business for the term of 10 years.^b

SAME—MICHIGAN STATUTE.—The Michigan act of June 23, 1899 (Sess. Laws, 1899, p. 409, No. 255), to prevent trusts and monopolies, is prospective only in its operation, and does not affect a contract made prior to its passage which was valid when made.

CONTRACT IN PARTIAL RESTRAINT OF TRADE^c—VALIDITY—SALE OF BUSINESS AND GOOD WILL.—A covenant by the stockholders of a corporation which sold its property, business, and good will, that, in consideration of such sale and as an inducement thereto, they would not directly or indirectly engage in the same or like kind of business as that carried on by the company in the same territory or in the immediate vicinity of such territory for 10 years after the sale, rests upon a good consideration and is lawful, and the right of the

^a Affirmed by Circuit Court of Appeals, Sixth Circuit (131 Fed., 31). See p. 566. Petition for writ of certiorari denied by the Supreme Court (195 U. S., 636). Memorandum decision. Not reprinted.

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^c Validity of monopolistic contracts as affected by public policy, see notes to *Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 9 C. C. A. 666; *Cravens v. Carter-Crume Co.*, 34 C. C. A. 486.

See Contracts, vol. 11, Cent. Dig. § 555.

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purchaser to enforce it cannot be affected by the question whether he has conducted the business lawfully since his purchase.

SAME—SUIT TO ENFORCE—DEFENSES.—In a suit to enjoin a defendant from violating a contract by which for a valuable consideration he covenanted not to engage in business for himself or another in competition with that of complainant for a term of years, and to enjoin a codefendant from employing his services in a competing business, it is no defense that his codefendant hired him in ignorance of the contract, and will suffer damage if deprived of his services.

In Equity. On motion for preliminary injunction.

Chas. S. Thornton and *Henry M. Duffield*, for complainant.

Fred A. Baker and *E. E. Kane*, for defendants.

SWAN, District Judge.

In this cause the motion to vacate the restraining order issued herein and the motion for a preliminary order was continued until the further order of the court. The main defense to the bill presented, it was then thought, a question to be determined upon plenary proofs rather than upon affidavits. In the expectation that the taking of proofs, then in progress, would obviate the labor of [876] digesting the many voluminous affidavits submitted upon the hearing of the motion for injunction, and reviewing upon the proofs and facts in issue, the formal disposition of that motion was postponed with that end in view. The taking of the testimony, however, has been extended by stipulations of the parties, and is not completed. The defendants now urge that their interests will suffer injury by deferring decision until the completion of the proofs. To avert that result, and to facilitate the review of this matter, the conclusions here reached are founded upon the affidavits filed, notwithstanding the unsatisfactory nature of such data compared with plenary proofs.

The bill is filed to restrain the defendant Davis from a breach of his contract hereinafter set forth, which contract, it is claimed by complainant, was and is a part of the consideration for the purchase by complainant of the property and good will of the Davis Fresh & Salt Fish Company, a

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corporation organized under and by virtue of the laws of the state of Michigan, and transacting a general fish business, and also engaged in buying, catching, producing, and selling salt and fresh fish. The company had its principal office in the city of Detroit, in said state. It also carried on business at Cleveland, Columbus, and Dayton, Ohio; Louisville, Ky.; Nashville, Tenn.; St. Louis and Kansas City, Mo.; Buffalo and New York City, in the state of New York; Grand Rapids, Jackson, East Saginaw, Lansing, Port Huron, and Detroit, Mich. The bill also seeks to have the Wolverine Fish Company, Limited, restrained from aiding Davis to violate his contract with complainant by employing said Davis in its business.

On August 14, 1898, in consideration of the sum of \$17,-473.14, the Davis Fresh & Salt Fish Company sold to William Vernon Booth, of Chicago, with the consent of all of its officers and stockholders, all of the goods, chattels, and property of every kind, nature, and description to it belonging, or in which it had any interest at that time, and, as part thereof, the good will of the business conducted by it at Detroit, and gave said Booth a bill of sale, with warranty of title, signed by defendant Davis, its president, and James T. Donaldson, its secretary, appended to which was the following, signed by said Davis:

"For and in consideration of one dollar and other valuable consideration, which I acknowledge, I hereby agree to perform the covenants and agreements above made and to be performed by the Davis Fresh & Salt Fish Company.

"Witness my hand and seal this 14th day of September, A. D. 1898."

Said Davis was a stockholder and the principal officer and manager of the vendor corporation, and apparently very desirous that the contract of sale should be completed, and he and other stockholders of the Davis Fresh & Salt Fish Company executed the following agreement:

"This instrument witnesseth, That William Vernon Booth has purchased the plant, business and good will of the business of the Davis Fresh & Salt Fish Company, and has paid therefor the sum of \$17,-473.14; that in making said transfer, and as an inducement to said William Vernon Booth to purchase said plant, business and good will and pay the sum aforesaid for the same, we have each agreed that we would not, and we now do agree, each for himself, jointly and severally with him, the said William Vernon Booth, his heirs and assigns, forever,

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that we will not, during the next ten years, in the territory or the immediate vicinity of the territory dealt in by our company, or operated in by ourselves or the agents or employes of the company, engage or in any [877] manner be interested in, either directly or indirectly, for ourselves or for others, the same or like kind or character of business as that heretofore conducted and now being carried on by said company, and that we will not, during the said period of ten (10) years, either directly or indirectly, be guilty of any act interfering with the business, its good will, its trade or its customers, or come in competition with the same; and we will not, jointly or severally, either in firms or corporations, or as individuals, or in any other way, directly or indirectly interfere with the said trade or business or do any act prejudicial to the same or any part thereof, or interfere with the persons employed therein; the meaning hereof being that the said William Vernon Booth is buying and paying for the good will of the business in the largest and fullest scope of the term; and that we will not, and each agrees that he will not, do anything to interfere with or injure the said business, but will during said period, lend his aid and best influence to the promotion and advancement of the same.

"In witness whereof we have hereunto subscribed our names and affixed our seals, jointly and severally, this first day of August, A. D. 1898.

"EDGAR A. DAVIS.

"JAMES T. DONALDSON.

"BELLE R. HARPER.

"ED. E. KANE.

"BELLE B. DAVIS."

The consideration named in the instrument quoted above was paid on or about the 14th of September, 1898, to the Davis Fresh & Salt Fish Company, and by it distributed among its stockholders, defendant Davis receiving his full share thereof. The purchase and agreement recited above were made by said Booth, as agent for complainant, and a formal transfer was made by Booth to his principal of all the property, rights, and contracts involved in the transaction. The property was duly delivered. The complainant has entered into the possession thereof, and, the bill claims, is continuing such business in Detroit and the other places where the Davis Fresh & Salt Fish Company conducted its business before said sale. The bill seeks an injunction against Davis from violating his said agreement, and against the Wolverine Fish Company, Limited, and other defendants (except Edson, who was not served), from aiding and assisting Davis in the violation of his contract. The answer of the defendants, and the separate answer of defendant Davis, do not dispute the purchase of the property and good will of the Davis Fresh & Salt Fish Company. The defense is, first, that the

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contract is against public policy and in restraint of trade; that it is void under the provisions of the "Sherman Act," so-called (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and an act of the Legislature of the state of Michigan, entitled "An act to prevent trusts, monopolies and combinations of capital, skill and arts, and carrying out restraints in trade and commerce," etc., approved June 23, 1899 (Sess. Laws 1899, p. 409, No. 255).

The Sherman act has no bearing upon this controversy. Its purpose and scope is to avoid all contracts and combinations in the form of trusts or otherwise, or conspiracy in restraint of trade and commerce among the several states and with foreign nations. *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *United States v. Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. The business of the complainant is lawfully conducted by the sale of its commodities at the different points where the business acquired from the Davis Fresh & Salt Fish Company was carried on. It had noth- [878] ing to do with the interstate or foreign trade or commerce subject to congressional legislation. It produced and sold its goods at the several places where it did business, just as its vendor had and as any individual or corporation might do, and it had the same right to engage in such business on complying with the laws in the states in which it was carried on. The statute of Michigan which defendants have invoked as invalidating the contracts and business of the complainant acquired from the Davis Fresh & Salt Fish Company was not passed until a year after the purchase by complainant of that company's property and good will. It is in terms prospective, and cannot be invoked to defeat a contract lawful when made. Its first section defines a trust as—

"A combination of capital, skill or arts by two or more persons, firms, partnerships, corporations or associations of persons, or of any two or more of them, for either, any or all of the following purposes:

"(1) To create and carry out restrictions in trade or commerce.

"(2) To limit or reduce the production, or increase or reduce the price of merchandise or any commodity.

"(3) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

"(4) To fix at any standard or figure whereby its price to the public or consumer shall be in any manner controlled or established any

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article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state."

Examination of the provisions of this act is convincing that it is directed only against combinations of persons, firms, partnerships, corporations, or associations of persons conspiring to co-operate in violation of its provisions, and that it contains nothing prohibitive of the acquisition by a person, persons, corporation, or association of the business or property of any person or association, natural or artificial. All such persons or associations may acquire property and carry on business at as many different places as their capital will warrant, and fix their own prices for their commodities, providing they do not, for that purpose and in its accomplishment, combine with other persons, firms, or organizations to effect any of the ends denounced by the statute. The prior Michigan statute of 1889, in existence at the time of the execution of the contracts under which complainant claims, was repealed by an act of 1899. There is grave question as to its validity, and that doubt probably prompted the act of 1899. The transaction by which the complainant acquired the title and interest for which it seeks protection in this cause was an out and out purchase of the vendor corporation's property and good will, and of the ancillary agreement of its stockholders, the breach of which agreement is the gravamen of the complainant's case. That such a transaction is lawful seems clear. In *United States v. Ad-dyston Pipe & Steel Co.*, 85 Fed. 271-281 et seq., 29 C. C. A. 141, 46 L. R. A. 122, Judge Taft considers the question here involved, and in a forcible opinion demonstrates that agreements by the seller of property or business not to compete with the buyer in such a way as to impair the business sold are perfectly valid. The opinion has so carefully and fully reviewed the authorities in support of this proposition as to exhaust the subject. The judgment of the Court of Appeals (except in a minor part having [879] no concern with the main question) was affirmed by the Supreme Court of the United States. 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. It is therefore a matter of no concern whether or not the complainant is conducting its business in such a way as to reduce the cost of its commodity, and to increase its profits in

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that way, or by raising the price otherwise. The contract of purchase which it made with the Davis Fresh & Salt Fish Company, and its agreement with the defendant Davis and the other stockholders, by which they engage not to compete, individually or otherwise, directly or indirectly, with the complainant, was a contract wholly collateral to the scheme and method of its business and its rights and equities under the contract of sale; and the agreement with Davis and the other stockholders can be enforced with as much propriety as any other lawful contract or agreement into which it might enter. *Atlanta v. Chattahoochee F. & P. Works* (C. C. A., Sixth Circuit, decided Dec. 8, 1903) 127 Fed. 23. It is well settled that an agreement which operates merely as a partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In *Oregon Steamship Navigation Co. v. Winsor*, 20 Wall. 67, 22 L. Ed. 315, Mr. Justice Bradley says:

"In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the protection of the party with whom the contract is made; * * * but a contract not to use a trade at a particular place, if it be founded upon a good consideration and be made for a good purpose, is valid. Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void."

Examining this agreement between complainant and Davis, it will be found that it has no feature which the law condemns. It is limited, as to time, for the 10 years ensuing its date; "and to the territory or immediate vicinity of the territory dealt in by the company, or operated in by ourselves or the agents or employes of the company." Its validity is fully sanctioned by the case of the *Oregon Steamship Navigation Company v. Winsor*, 20 Wall. 67, 22 L. Ed. 315. The execution of the contract is admitted by the defendants. It is no answer to its enforcement against Davis that he did not get the consideration he expected from the sale, because, as he alleges, complainant did not carry out an understanding subsequently made with him. The defense that the Davis Fresh & Salt Fish Company had no business and no good will, but its business at the time of the contract was carried on by Davis as trustee for the company, is unconscionable and without merit. The objection

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that the complainant is a trust and a monopoly is answered by the view taken of the statute of Michigan of 1899, and it is shown by the affidavits that the complainant's business in this line is but a small fraction of that done by other dealers in the same commodities in the territory covered by its operations, and that it is but one of several hundred dealers in that territory.

It is further claimed that the bill does not aver that the complainant has complied with the statute with regard to foreign corporations. The affidavits submitted by complainant completely negative this objection.

It is urged that the agreement with Davis and the other stockholders is not supported by any consideration. There is no force in this position. [880] It recites that the signers do agree, "as an inducement to said William Vernon Booth to purchase said plant, business and good will and pay the sum aforesaid (\$17,473 14) for the same, we each have agreed that we would not, and we now do agree, each for himself, jointly and severally * * * that we will not during the next ten (10) years, in the territory or the immediate vicinity of the territory dealt in by our company, or operated in by ourselves or the agents or employés of the company, engage or in any manner be interested in, either directly or indirectly, for ourselves or for others, the same or like kind or character of business as that heretofore conducted and now being carried on by said company, its officers, agents, employés or assigns," etc. The signers of this instrument are estopped from denying want of consideration for its provisions. Their express acknowledgment in the instrument is that an inducement to the purchase at the time was their several contracts not to compete, directly or indirectly, as individuals or otherwise, with their vendee during the time and in the territory designated. The effect of such competition, it is obvious, would be to impair the value of the property and good will purchased, and, as has been said, a contract which would insure against this is not in restraint of trade, but valid. In *Hendrick v. Lindsay*, 93 U. S. 148, 23 L. Ed. 855, it is said:

"Damage to the promisee constitutes as good a consideration as benefit to the promisor. In *Pillan v. Van Mierop*, 3 Burr. 1663, the court say: 'Any damage or suspension of a right, or possibility of a

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loss, occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise, and will make it binding, although no actual benefit accrued to the party promising.' This rule is sustained by a long list of adjudged cases."

The restraint upon the defendants secured by this contract, it is clear beyond question from the terms of the contract itself, was regarded by both parties thereto as consideration. It does not lie in the mouth of Davis, when he has deliberately and for the purpose of inducing the complainant to pay the large sum of \$17,473.14 for the business, which he now states was worthless, to deny that there was any consideration for his agreement. In fact, the denial of want of consideration, and Davis' objections to the contract that the Davis Fresh & Salt Fish Company had no business or good will at the time of the sale, are inconsistent in themselves, and compel the conclusion that, if the vendor corporation had no business, the sale of its property and the inventory upon which it was made was a fraud upon the purchaser, which discredits the claim of Davis that the agreement of himself and fellow stockholders was an independent transaction.

In behalf of the Wolverine Fish Company, Limited, it is urged that it had no knowledge of the agreement entered into by Davis to refrain, directly or indirectly, from engaging in the fish business for himself or others, and that to deprive it of his services and experience is a hardship. The equities of the case in favor of the complainant, in view of the facts, are much stronger than the consideration urged by the Wolverine Company against being enjoined from the employment of Davis in violation of his contract with complainant. Whatever injury results to the Wolverine Fish Company, Limited, from the enforcement of Davis' contract with complainant, is chargeable, not to the latter, but to Davis himself. If that company is injured, it is because [881] of Davis' willful breach of his contract with the complainant, and not by reason of any act or omission of the complainant. It is no answer to the enforcement of complainant's contract that Davis has broken it and entered into relations with others whereby the benefit of his experience and services will operate inevitably to the detriment of the complainant, although Davis' employer did not know

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of his self-imposed disability. To hold otherwise would sanction the doctrine that one entering into a like contract to that executed by Davis to the complainant might be absolved from his obligations under the contract by hiring his services to one ignorant of his disability. Such a construction of the letter and spirit of like engagements would make them entirely nugatory, and would be grossly unjust to the party who had paid in good faith a valuable consideration for the property and good will of a business which his vendors collectively and individually have covenanted not to impair or invade.

It results from these views that the complainant is entitled to the injunction restraining Davis from a breach of his contract with the complainant, and restraining the Wolverine Fish Company, Limited, from benefiting in any way by his services and experience in the fish business, as defined in the contract between complainant and Davis, and an injunction will be issued, according to the prayer of the bill, against Davis and the Wolverine Fish Company, Limited.

[38] MONTAGUE & COMPANY v. LOWRY.^a

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 46. Submitted October 27, 1903.—Decided February 23, 1904.

[193 U. S. 38.]

An association was formed in California by manufacturers of, and dealers in, tiles, mantels and grates; the dealers agreed not to purchase materials from manufacturers who were not members and not to sell unset tiles to any one other than members for less than list prices which were fifty per cent higher than the prices to members; the manufacturers, who were residents of States other than California agreed not to sell to any one other than members; viola-

^a Begun in the Circuit Court for the Northern District of California, and there entitled *Lowry v. Tile, Mantel and Grate Ass'n. of Cal.* Demurrer overruled (98 Fed., 817). See vol. 1, p. 995. Charge to jury (106 Fed., 38). See p. 53. Judgment affirmed by Circuit Court of Appeals, Ninth Circuit. (115 Fed., 27). See p. 112. Case then and subsequently entitled *Montague & Co. v. Lowry*. Affirmed by Supreme Court (193 U. S. 38.)

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tions of the agreement rendered the member subject to forfeiture of membership. Membership in the association was prescribed by rules and dependent on conditions, one of which was the carrying of at least \$3,000 worth of stock, and whether applicants were admitted was a matter for the arbitrary decision of the association. In an action by a firm of dealers in tiles, mantels and grates, in San Francisco, whose members had never been asked to join the association and who had never applied for admission therein, and which did not always carry \$3,000 worth of stock, to recover damages under § 7 of the Anti-Trust Act of July 2, 1890—

Held that although the sales of unset tiles were within the State of California and although such sales constituted a very small portion of the trade involved, agreement of manufacturers without the State not to sell to any one but members was part of a scheme which included the enhancement of the price of unset tiles by the dealers within the State and that the whole thing was so bound together that the transactions within the State were inseparable and became a part of a purpose which when carried out amounted to, and was, a combination in restraint of interstate trade and [39] commerce. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, followed; *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604, distinguished.

Held that the association constituted and amounted to an agreement or combination in restraint of trade within the meaning of the act of July 2, 1890, and that the parties aggrieved were entitled to recover threefold the damages found by the jury.

Held that the amount of attorney's fees allowed as costs under the act is within the discretion of the trial court and as such discretion is reasonably exercised this court will not disturb the amount awarded.^a

[48 L. ed., 608.] ^b

[An association of wholesale dealers in tiles, mantels, and grates in San Francisco and vicinity, and nonresident manufacturers of tiles and fireplace fixtures, in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tiles to nonmembers for less than list prices, which are more than fifty per cent higher than prices to members, while the manufacturers agree not to sell their products or wares to nonmembers at any price, under penalty of forfeiture of membership, is an agreement or combination in restraint of trade within the meaning of the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202).]

^a The foregoing syllabus and the abstract of argument copyrighted, 1904, by The Banks Law Publishing Co.

^b The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 48, p. 608. Copyrighted, 1903, 1904, by the Lawyers' Co-Operative Publishing Co.

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[The discretion of the trial court under the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202), § 7, to allow a reasonable attorney's fee to the successful plaintiff in an action brought under that section to recover damages for a violation of the provisions of that act against combinations in restraint of trade, is not abused by an allowance of \$750, although the verdict was for but \$500, where the trial took five days, and from the proof offered it appeared that from \$750 to \$1,000 would be a reasonable sum.]

THIS action was brought under section 7 of the act of July 2, 1890, 26 Stat. 209; 3 Comp. Stat. 3202, commonly called the Anti-Trust Act. The section reads as follows:

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Plaintiffs in error (defendants below) seek to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, 115 Fed. Rep. 27, affirming a judgment for plaintiffs, entered in the Circuit Court for the Northern District of California, upon a verdict of a jury. 106 Fed. Rep. 38.

It appeared in evidence on the trial in the United States Circuit Court that the plaintiffs for many years prior to the commencement of this action had been copartners, doing business as such in the city of San Francisco in the State of California, and dealing in tiles, mantels and grates, and that The Tile, Mantel and Grate Association of California, and the officers and members thereof, had since, on or about the — day of January, 1898, constituted under that name an unincorporated organization composed of wholesale dealers in tiles, mantels and grates, who were citizens and residents of the city and county of San Francisco, or the city of Sacramento, or the city of San José in the State of California, and such organization was also composed of the manufacturers of tiles, mantels [40] and grates, who were residents of other States, and engaged in the sale of their manufactured articles (among others) to the various other defendants in the State of California. There were no manufacturers of tiles within the State of California, and all the defendants

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who were residents of that State and who were also dealers in tiles, in the prosecution of their business, procured the tiles from outside the State of California and from among those manufacturers who were made defendants herein. The manufacturers and dealers were thus engaged in the prosecution of a business which, with reference to the sales of tiles, amounted to commerce between the States. Under these circumstances the dealers in tiles, living in San Francisco, or within a radius of 200 miles thereof, and being some of the defendants in this action, together with the Eastern manufacturers of tiles, who are named as defendants herein, formed an association called The Tile, Mantel and Grate Association of California. The objects of the association, as stated in the constitution thereof, were to unite all acceptable dealers in tiles, fireplace fixtures and mantels in San Francisco and vicinity, (within a radius of 200 miles,) and all American manufacturers of tiles, and by frequent interchange of ideas advance the interests and promote the mutual welfare of its members.

By its constitution, article I, section 1, it was provided that any individual, corporation or firm engaged in or contemplating engaging in the tile, mantel or grate business in San Francisco, or within a radius of 200 miles thereof, (not manufacturers,) having an established business and carrying not less than \$3,000 worth of stock, and having been proposed by a member in good standing and elected, should, after having signed the constitution and by-laws governing the association, and upon the payment of an entrance fee as provided, enjoy all the privileges of membership. It was provided in the second section of the same article that all associated and individual manufacturers of tiles and fireplace fixtures throughout the United States might become non-resident members of the association upon the payment of an entrance fee as provided, and after having signed the constitution and by-laws govern- [41] ing the association. The initiation fee was, for active members, \$25, and for non-resident members \$10, and each active member of the association was to pay \$10 per year as dues, but no dues were charged against non-residents.

An executive committee was to be appointed, whose duty

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it was to examine all applications for membership in the association and report on the same to the association. It does not appear what vote was necessary to elect a member, but it is alleged in the complaint that it required the unanimous consent of the association to become a member thereof, and it was further alleged that by reason of certain business difficulties there were members of the association who were antagonistic to plaintiffs, and who would not have permitted them to join, if they had applied, and that plaintiffs were not eligible to join the association for the further reason that they did not carry at all times stock of the value of \$3,000.

The by-laws, after providing for the settlement of disputes between the members and their customers, by reason of liens, foreclosure proceedings, etc., enacted as follows, in article III:

"SEC. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association.

"SEC. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents or manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel and Grate Association of California, shall forfeit their membership in the association."

The term "list prices," referred to in the seventh section, was a list of prices adopted by the association, and when what are called "unset" tiles were sold by a member to any one not a member, they were sold at the list prices so adopted, which [42] were more than fifty per cent higher than when sold to a member of the association.

The plaintiffs had established a profitable business and were competing with all the defendants, who were dealers and engaged in the business of purchasing and selling tiles, grates and mantels in San Francisco prior to the formation of this association. The plaintiffs had also before that time been accustomed to purchase all their tiles from tile manufacturers in Eastern States, (who were also named as parties defendants in this action,) and all of those manufacturers subsequently joined the association. The plaintiffs were not members of the association and had never been, and had

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never applied for membership therein and had never been invited to join the same.

The proof shows that by reason of the formation of this association the plaintiffs have been injured in their business, because they were unable to procure tiles from the manufacturers at any price, or from the dealers in San Francisco, at less than the price set forth in the price list mentioned in the seventh section of the by-laws, *supra*, which was more than fifty per cent over the price at which members of the association could purchase the same. Before the formation of the association the plaintiffs could and did procure their tiles from the manufacturers at much less cost than it was possible for them to do from the dealers in San Francisco after its formation.

There was proof on the part of the defendants below that the condition of carrying \$3,000 worth of stock, as mentioned in the constitution, had not always been enforced, but there was no averment or proof that the article of the constitution on that subject had ever been altered or repealed.

The jury rendered a verdict for \$500 for the plaintiffs, and, pursuant to the provisions of the seventh section of the act, judgment for treble that sum, together with what the trial court decided to be a reasonable attorney's fee, was entered for the plaintiffs.

Mr. William M. Pierson for plaintiffs in error:

The association is not obnoxious to the provisions of the Sherman Anti-Trust Act.

[43] This case can be distinguished from the *Trans-Missouri Case*, 166 U. S. 290, and the *Joint Traffic Case*, 171 U. S. 505. So far as the transactions between the dealers and the manufacturers are concerned, the association fixes no tariff or prices whatever; and it must be observed generally that the association itself does no business. It is lawful for a man to decline to work for another man or class of men, or to do business with another man or class of men, as he sees fit; and what is lawful for one man to do in this regard, several men may agree to act jointly in doing, and may make express and simultaneous declaration of their purpose. The lawfulness of a provision as between dealers and manufac-

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turers, such as is contained in the constitution and by-laws of the plaintiffs in error, is impliedly recognized in the *Hopkins Case*, 171 U. S. 578, and is aptly recognized and approved in the *Anderson Case*, 171 U. S. 604. See also *U. S. v. Greenhut*, 51 Fed. Rep. 205; *In re Greene*, 52 Fed. Rep. 104; *U. S. v. Nelson*, 52 Fed. Rep. 646; *Dueber Mfg. Co. v. Howard Co.*, 55 Fed. Rep. 851; *S. C.*, 14 C. C. A. 14; *Gibbs v. McVealy*, 102 Fed. Rep. 594; *Steamship Co. v. McGregor*, L. R. 23 Q. B. 598; *Bohn v. Hollis*, 54 Minnesota, 223.

Within these authorities and on a view of the constitution and by-laws of the association in question, it will appear that the provisions touching transactions between dealers and manufacturers are not obnoxious to the act of Congress, and it will appear further that the association in question has none of the elements of a monopoly. Indeed, the object of the association is said to be to unite all acceptable dealers and all American manufacturers.

An association cannot be in restraint of trade when its doors are open to all in the trade, and it fixes no price whatever. The only limitation was to have established homes with \$3,000 worth of stock.

The transactions in unset tiles at list prices are local transactions, intra-state transactions, in no respect taking on the quality of interstate commerce and being purely local, are not within the purview of the act. *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211. Assuming, however, for argument, the transactions in unset tiles to be along the line of interstate commerce,—they are so trifling, incidental and remote in their bearing upon interstate trade and commerce as to be what mathematicians call negligible quantities which may be left out of consideration without impairing the general result. *Trans-Missouri case*, the *Joint Traffic case*, and *Hopkins case*, *supra*.

The attorney fee allowed was excessive. Plaintiffs below asked for \$10,000 damages and were only allowed \$500 and the fee is out of proportion.

Mr. J. C. Campbell for defendant in error:

The Tile, Mantel and Grate Association of California is a combination declared to be illegal by the act of July 2, 1890,

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for it is in restraint of trade or commerce among the several States, and was formed to and does monopolize such trade or commerce. *United States v. Freight Association*, 166 U. S. 290, 323; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 241, 244; *United States v. E. C. Knight Co.*, 156 U. S. 1, 16; *United States v. Coal Dealers Association*, 85 Fed. Rep. 252; *Hopkins v. United States*, 171 U. S. 578, and see p. 597; *Anderson v. United States*, 171 U. S. 604, distinguished.

The counsel fee was fair and reasonable.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

The question raised by the plaintiffs in error in this case is, whether this association, described in the foregoing statement of facts, constituted or amounted to an agreement or combination in restraint of trade within the meaning of the so-called Anti-Trust Act of July 2, 1890?

The result of the agreement when carried out was to prevent the dealer in tiles in San Francisco, who was not a member of the association, from purchasing or procuring the same upon any terms from any of the manufacturers who were such members, and all of those manufacturers who had been accustomed to sell to the plaintiffs were members. The non- [45] member dealer was also prevented by the agreement from buying tiles of a dealer in San Francisco who was a member, excepting at a greatly enhanced price over what he would have paid to the manufacturers or to any San Francisco dealer who was a member, if he, the purchaser, were also a member of the association. The agreement, therefore, restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other States, so that they could only be sold to the members of the association, and it enhanced prices to the non-member as already stated.

The plaintiffs endeavored in vain to procure tiles for the purposes of their business from these tile manufacturers, but the latter refused to deal with them because plaintiffs were not members of the association. It is not the simple case of manufacturers of an article of commerce between the several

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States refusing to sell to certain other persons. The agreement is between manufacturers and dealers belonging to an association in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tiles to any one not a member of the association for less than list prices, which are more than fifty per cent higher than the prices would be to those who were members, while the manufacturers who became members agreed not to sell to any one not a member, and in case of a violation of the agreement they were subject to forfeiting their membership. By reason of this agreement, therefore, the market for tiles is, as we have said, not only narrowed but the prices charged by the San Francisco dealers for the unset tiles to those not members of the association are more than doubled. It is urged that the sale of unset tiles, provided for in the seventh section of the by-laws, is a transaction wholly within the State of California and is not in any event a violation of the act of Congress which applies only to commerce between the States. The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as [46] one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tiles by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tiles ceases to be a mere transaction in the State of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.

Again, it is contended the sale of unset tiles is so small in San Francisco as to be a negligible quantity; that it does not amount to one per cent of the business of the dealers in tiles in that city. The amount of trade in the commodity is not very material, but even though such dealing heretofore has been small, it would probably largely increase when those who formerly purchased tiles from the manufacturers are

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shut out by reason of the association and their non-membership therein from purchasing their tiles from those manufacturers, and are compelled to purchase them from the San Francisco dealers. Either the extent of the trade in unset tiles would increase between the members of the association and outsiders, or else the latter would have to go out of business, because unable to longer compete with their rivals who were members. In either event, the combination, if carried out, directly effects a restraint of interstate commerce.

It is also contended that, as the expressed object of the association was to unite therein all the dealers in San Francisco and vicinity, the plaintiffs had nothing more to do than join the association, pay their fees and dues and become like one of the other members. It was not, however, a matter of course to permit any dealer to join. The constitution only provided for "all acceptable dealers" joining the association. As plaintiffs were not invited to be among its founders, it would look as if they were not regarded as acceptable. However that may be, they never subsequently to its formation applied for admission. It is plain that the question of their admission, if they had so applied, was one to be arbitrarily determined by the association. The constitution provided for the appointment of an executive committee, whose duty it was to examine all applications for membership in and to report on the same to the association, after which it was to decide whether the applicants should be admitted or not. If they were not acceptable the applicants would not be admitted, and whether they were or not, was a matter for the arbitrary decision of the association. Its decision that they were not acceptable was sufficient to bar their entrance.

Again, it appears that plaintiffs were not eligible under the constitution, because they did not always carry stock worth \$3,000, which by section 1 of article I, was made a condition of eligibility to membership. True, it was stated in evidence that this provision had not been enforced, but there was no averment or proof that it had been repealed, and there was nothing to prevent its enforcement at any time that an application was made by any one who would not come up to the condition. The case stands, therefore,

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that the plaintiffs had not been asked to join the association at its formation; that they did not fill the condition provided for in its constitution as to eligibility, and that if they had applied their application was subject to arbitrary rejection.

The plaintiffs, however, could not, by virtue of any agreement contained in such association, be legally put under obligation to become members in order to enable them to transact their business as they had theretofore done, and to purchase tiles as they had been accustomed to do before the association was formed.

The consequences of non-membership were grave, if not disastrous, to the plaintiffs. It has already been shown how the prices of tiles were enhanced so far as plaintiffs were concerned, and how by means of this combination interstate commerce was affected.

The purchase and sale of tiles between the manufacturers in one State and dealers therein in California was interstate commerce within the *Addyston Pipe case*, 175 U. S. 211. It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article, [48] which was an article of commerce between the States. *United States v. E. C. Knight Company*, 156 U. S. 1, did not therefore cover it. It is not brought within either *Hopkins v. United States*, 171 U. S. 578, or *Anderson v. United States*, 171 U. S. 604. In the first case it was held that the occupation of the members of the association was not interstate commerce, and in the other that the subject matter of the agreement did not directly relate to, embrace or act upon interstate commerce, for the reasons which are therein stated at length. Upon examination we think it is entirely clear that the facts in the case at bar bear no resemblance to the facts set forth in either of the above cases and are not within the reasoning of either. The agreement directly affected and restrained interstate commerce.

The case we regard as a plain one and it is unnecessary to further enlarge upon it.

There is one other question which, although of secondary importance, is raised by the plaintiffs in error. After the

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rendition of the verdict the plaintiffs below claimed a reasonable attorney's fee under the seventh section of the act, and made proof of what would be a reasonable sum therefor, from which it appeared that it would be from \$750 to \$1,000. The trial court awarded to the plaintiffs \$750. The verdict being only for \$500, the plaintiffs in error claimed that the allowance was an improper and unreasonable one. The trial took some five days. The judgment in effect pronounced the association illegal. The amount of the attorney's fee was within the discretion of the trial court, reasonably exercised, and we do not think that in this case such discretion was abused.

The judgment is

Affirmed.

[197] NORTHERN SECURITIES COMPANY *v.*
 UNITED STATES.^a

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MINNESOTA.

[193 U. S. 197.]

No. 277. Argued December 14, 15, 1903.—Decided March 14, 1904.

Stockholders of the Great Northern and Northern Pacific Railway companies—corporations having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound—combined and conceived the scheme of organizing a corporation, under the laws of New Jersey, which should hold the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation. Pursuant to such combination the Northern Securities Company was organized as the holding corporation through which that scheme should be executed; and under that scheme such holding corporation became the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies, who delivered their stock, receiving, upon the agreed basis, shares of stock in the holding corporation.^b

^a Decree of the Circuit Court (120 Fed., 721, 731). See pp. 215, 231.

^b Syllabus and extracts of briefs, arguments, etc., copyrighted, 1904, by The Banks Law Publishing Co.

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Held, that, necessarily, the constituent companies ceased, under this arrangement, to be in active competition for trade and commerce along their respective lines, and became, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which competition between the constituent companies would cease.

Held, that the arrangement was an illegal combination in restraint of interstate commerce and fell within the prohibitions and provisions of the act of July 2, 1890, and it was within the power of the Circuit Court, in an action, brought by the Attorney General of the United States after the completion of the transfer of such stock to it, to enjoin the holding company, from voting such stock and from exercising any control whatever over the acts and doings of the railroad companies, and also to enjoin the railroad companies from paying any dividends to the holding corporation on any of their stock held by it.

Held, that although cases should not be brought within a statute containing criminal provisions that are not clearly embraced by it, the court should not by narrow, technical or forced construction of words exclude cases from it that are obviously within its provisions and while the act of July 2, 1890, contains criminal provisions, the Federal court has power under § 4 of the act in a suit in equity to prevent and restrain violations [198] of the act, and may mould its decree so as to accomplish practical results such as law and justice demand.

HARLAN, BROWN, McKENNA and DAY, JJ.*

The combination is, within the meaning of the act of Congress of July 2, 1890, known as the Anti-Trust Act, a "trust"; but if not, it is a combination in restraint of interstate and international commerce, and that is enough to bring it under the condemnation of the act.

From prior cases in this court, the following propositions are deducible and embrace this case:

Although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it embraces and declares to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which

* Mr. Justice HARLAN announced the affirmance of the decree of the Circuit Court and delivered an opinion in which BROWN, McKENNA and DAY, JJ., concurred. Mr. Justice BREWER delivered a separate opinion in which he concurred in affirming the decree of the Circuit Court.

Mr. Justice WHITE delivered a dissenting opinion in which the CHIEF JUSTICE and PECKHAM and HOLMES, JJ., concurred; Mr. Justice HOLMES delivered a dissenting opinion in which the CHIEF JUSTICE and WHITE and PECKHAM, JJ., concurred.

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directly or necessarily operates in restraint of trade or commerce among the several States or with foreign nations.

The act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints, reasonable or unreasonable, imposed by any combination, conspiracy, or monopoly upon such trade or commerce. Railroad carriers engaged in interstate or international trade or commerce are embraced by the act.

Combinations, even among private manufacturers or dealers, whereby interstate or international commerce is restrained, are equally embraced by the act.

Congress has the power to establish rules by which interstate and international commerce shall be governed, and by the Anti-Trust Act has prescribed the rule of free competition among those engaged in such commerce.

Every combination or conspiracy which would extinguish competition between otherwise competing railroads, engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act.

The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce.

To vitiate a combination, such as the act of Congress condemns, it need not [199] be shown that such combination, in fact, results, or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition.

The constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce.

Under its powers to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question. *United States v. E. C. Knight Co.*, 156 U. S. 1; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *United States v. Joint Traffic Association*, 171 U. S. 505; *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Montague & Co. v. Lowry*, 193 U. S. 38.

Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution.

If in the judgment of Congress the public convenience or the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

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When Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with combinations that were in restraint of their domestic commerce.

Subject to such restrictions as are imposed by the Constitution upon the exercise of all power, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce.

No State can, by merely creating a corporation, or in any other mode, project its authority into other States, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce; nor can any State give a corporation created under its laws authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land.

Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by Congress.

[200]

By MR. JUSTICE BREWER.

The act of July 2, 1890, was leveled, as appears by its title, at only unlawful restraints and monopolies. Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld.

The general language of the act is limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen.

A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person, but it is an artificial person, created and existing only for the convenient transaction of business.

Where, however, no individual investment is involved, but there is a combination by several individuals separately owning stock in two competing railroad companies engaged in interstate commerce, to place the control of both in a single corporation, which is organized for that purpose expressly and as a mere instrumentality by which the competing railroads can be combined, the resulting combination is a direct restraint of trade by destroying competition, and is illegal within the meaning of the act of July 2, 1890.

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A suit brought by the Attorney General of the United States to declare this combination illegal under the act of July 2, 1890, is not an interference with the control of the States under which the railroad companies and the holding company were, respectively, organized.^a

[48 L. ed., 679.]^b

[A combination by stockholders in two competing interstate railway companies to form a stock-holding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, violates the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), which declares illegal every combination or conspiracy in restraint of interstate commerce, and forbids attempts to monopolize such commerce or any part of it.]

[Congress did not exceed its power under the commerce clause of the Federal Constitution in enacting the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), declaring illegal every combination or conspiracy in restraint of interstate commerce, and forbidding attempts to monopolize such commerce or any part of it, although such statute is construed to embrace a combination of stockholders of two competing interstate railway companies to form a stock-holding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies.]

[The enforcement of the provisions of the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by a Federal court decree enjoining a corporation organized in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from exercising the power acquired by such corporation by virtue of its acquisition of such stock, does not amount to an invasion by the Federal Government of the reserved rights of the States creating the several corporations.]

[The constitutional guaranty of liberty of contract is not infringed by the enforcement of the provisions of the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), by a Federal court decree enjoining a corporation formed in pursuance of a combination of stockholders in two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from exercising the powers acquired by such corporation by virtue of its acquisition of such stock.]

[A Federal court, by its decree in a suit instituted under the authority

^a The foregoing syllabus and the abstracts of briefs and arguments, etc., copyrighted, 1904, by The Banks Law Publishing Co.

^b The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 48, p. 679. Copyrighted, 1903, 1904, by the Lawyers' Co-Operative Publishing Co.

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of the Anti-Trust Act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), § 4, to prevent and restrain violations of the act may properly enjoin a corporation organized in pursuance of a combination of stockholders of two competing interstate railway companies for the purpose of acquiring a controlling interest in the capital stock of such companies, from acquiring any further stock therein, from voting such stock as it then holds or may subsequently acquire, and from exercising any control over the railway companies by virtue of its holdings, and may restrain the railway companies from permitting or suffering any such action on the part of the stock-holding corporation, and from paying any dividends on account of the stock held by it.]

THE pleadings in this action and the decree of the Circuit Court are as follows:

PETITION.^a

To the judges of the Circuit Court of the United States for the District of Minnesota:

Now comes the United States of America, by Milton D. [201] Purdy, the United States attorney for the District of Minnesota, acting under direction of the Attorney-General of

^a Bill in equity of United States, this page, *supra*.

Exhibit: Certificate of Incorporation of Northern Securities Company, page 216, *post*.

Answer of Northern Securities Company, page 221, *post*.

Answer of Hill and other defendants, page 241, *post*.

Answer of Great Northern Railway Company, page 241, *post*.

Answer of Northern Pacific Railway Company, page 242, *post*.

Answer of Morgan and other defendants, page 247, *post*.

Answer of Lamont, defendant, page 255, *post*.

Decree of the Circuit Court, page 255, *post*.

Summary of facts from argument and brief of Mr. George B. Young for appellants, page 257, *post*.

Abstract of argument of Mr. John G. Johnson for appellant Northern Securities Company, page 268, *post*.

Abstract of argument of Mr. Charles W. Bunn for appellant Northern Pacific Railway Company, page 273, *post*.

Abstract of brief submitted by Mr. John W. Griggs for appellant Northern Securities Company, page 276, *post*.

Abstract of brief submitted by Mr. M. D. Grover for appellant Great Northern Railway Company, page 280, *post*.

Abstract of brief submitted by Mr. Francis Lynde Stetson and Mr. David Willcox for appellants Morgan, Bacon and Lamont, page 290, *post*.

Abstract of argument and brief of Mr. Attorney General Knox and

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the United States, and brings this its proceeding by way of petition against the Northern Securities Company, a corporation organized and existing under the laws of the State of New Jersey; the Great Northern Railway Company, a corporation organized and existing under the laws of the State of Minnesota; the Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin; James J. Hill, a citizen of the State of Minnesota and a resident of St. Paul, and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel Lamont, citizens of the State of New York and residents of New York City, and, on information and belief, complains and says:

I. The defendants, the Northern Pacific Railway Company and the Great Northern Railway Company, were, at the times hereinafter mentioned, and now are, common carriers, employed in the transportation of freight and passengers among the several States of the United States and between such States [202] and foreign nations, and, as such carriers so employed, were and are engaged in trade and commerce among the several States and with foreign nations.

II. On and prior to the 13th day of November, 1901, the defendants, James J. Hill, William P. Clough, D. Willis James, and John S. Kennedy, and certain other persons whose names are unknown to the complainant, but whom it prays to have made parties to this action when ascertained (hereinafter referred to as James J. Hill and his associate stockholders), owned or controlled a majority of the capital stock of the defendant, the Great Northern Railway Company, and the defendants, J. Pierpont Morgan and Robert Bacon (members of and representing the banking firm of J. P. Morgan & Co., of New York City), George F. Baker and Daniel S. Lamont, and certain other persons whose names are unknown to the complainant, but whom it prays to have

Mr. William A. Day, assistant to Attorney General, for the United States, appellee, page 297, *post*.

Opinion of Mr. JUSTICE HARLAN, page 317, *post*.

Opinion of Mr. JUSTICE BREWER, page 360, *post*.

Opinion of Mr. JUSTICE WHITE, page 364, *post*.

Opinion of Mr. JUSTICE HOLMES, page 400, *post*.

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made parties to this action when ascertained (hereinafter referred to as J. Pierpont Morgan and his associate stockholders), owned or controlled a majority of the capital stock of the defendant, the Northern Pacific Railway Company.

III. The Northern Pacific Railway Company and the Great Northern Railway Company, at and prior to the doing of the acts hereinafter complained of, owned or controlled and operated two separate, independent, parallel, and competing lines of railway running east and west into or across the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, the Northern Pacific system, extending from Ashland, in the State of Wisconsin, and from Duluth and St. Paul, in the State of Minnesota, through Helena, in the State of Montana, and Spokane, in the State of Washington, to Seattle and Tacoma, in the State of Washington, and Portland, in the State of Oregon, and the Great Northern system, extending from Superior, in the State of Wisconsin, and from Duluth and St. Paul, in the State of Minnesota, through Spokane, in the State of Washington, to Everett and Seattle, in the State of Washington, and to Portland, in the State of Oregon, with a branch line to Helena, in the State of Montana, thus furnishing [203] to the public two parallel and competing transcontinental lines connecting the Great Lakes and the Mississippi River with Puget Sound and the Pacific Ocean. At the times mentioned, these two railway systems, which will hereafter be referred to respectively as the Northern Pacific system and the Great Northern system, each of which, with its leased and controlled lines, main and branch, aggregates over 5,500 miles in length, were the only transcontinental lines of railway extending across the northern tier of States west of the Great Lakes, from the Great Lakes and the Mississippi River to the Pacific Ocean, and were then engaged in active competition with one another for freight and passenger traffic among the several States of the United States and between such States and foreign countries, each system connecting at its eastern terminals, not only with lines of railway, but with lake and river steamers to other States and to foreign countries, and at its western terminals with sea-going vessels to other States, Territories, and possessions of the United States and to foreign countries.

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IV. Prior to the year 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized and existing under certain acts and resolutions of Congress. During that year the company became insolvent, and the line was placed in the hands of receivers by the proper courts of the United States. While in this condition, awaiting foreclosure and sale, an arrangement was entered into between a majority of the bondholders of the Northern Pacific Railroad Company and the defendant, the Great Northern Railway Company, for a virtual consolidation of the Northern Pacific and Great Northern systems and the placing of the practical control of the Northern Pacific system in the hands of the defendant, the Great Northern Railway Company. This arrangement contemplated the sale, under foreclosure, of the property and franchises of the Northern Pacific Railroad Company to a committee of the bondholders, who should organize a new corporation, to be known as the Northern Pacific Railway Company, which was to become the [204] successor of the Northern Pacific Railroad Company; one-half of the capital stock of the new company was to be turned over to the shareholders of the defendant, the Great Northern Railway Company, which in turn was to guarantee the payment of the bonds of the Northern Pacific Railway Company. An agreement was to be entered into for the exchange of traffic at intersecting and connecting points and for the division of earnings therefrom. The carrying out of this arrangement was defeated by the decision of the Supreme Court of the United States in the case of *Pearsall v. The Great Northern Railway Company* (which was decided March 30, 1896, and is reported in the one hundred and sixty-first volume of the reports of said court, beginning on page 646, to which reference is made), in which it was held that the practical effect would be the consolidation of two parallel and competing lines of railway, and the giving to the defendant, the Great Northern Railway Company, a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, to the detriment of the public and in violation of the laws of the State of Minnesota.

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V. Early in the year 1901 the defendants, the Great Northern and Northern Pacific Railway companies, acting for the purpose of promoting their joint interests, and in contemplation of the ultimate placing of the Great Northern and Northern Pacific systems under a common source of control, united in the purchase of the total capital stock of the Chicago, Burlington and Quincy Railway Company, of Illinois, giving the joint bonds of the Great Northern and Northern Pacific Railway companies, payable in twenty years from date, with interest at 4 per cent per annum, for such stock, at the rate of \$200 in bonds in exchange for each \$100 in stock, and in this manner purchased and acquired about \$107,000,000 of the \$112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, or about 98 per cent thereof. In this manner, at the time stated, the defendants, the Great Northern and Northern Pacific Railway companies, secured control of the vast system of rail-
[205] way lines known as the Burlington system, about 8,000 miles in length, extending from St. Paul, in the State of Minnesota, where it connects with the Great Northern and Northern Pacific Railway systems, through the States of Minnesota, Wisconsin, and Illinois, to Chicago, in the State of Illinois, and from these two cities through said States and through the States of Iowa, Missouri, Nebraska, Colorado, South Dakota, Wyoming, and Montana, to Quincy, in the State of Illinois; to Burlington and Des Moines, in the State of Iowa; to St. Louis, Kansas City, and St. Joseph, in the State of Missouri; to Omaha and Lincoln, in the State of Nebraska; to Denver, in the State of Colorado; to Cheyenne, in the State of Wyoming, and to Billings, in the State of Montana, where it again connects with the Northern Pacific Railway system, these States lying west of Chicago and south of the States crossed by the Great Northern and Northern Pacific systems, and constituting the territory occupied in part by what is known as the Union Pacific Railway system, which has been and is a parallel and competing system within said territory with the said Burlington system.

VI. The attempt to turn over a controlling interest in the stock of the Northern Pacific Railway Company to the Great Northern Railway Company and thus effect a virtual con-

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solidation of the two railway systems, having thus, in the year 1896, been defeated by a decision of the Supreme Court of the United States, the defendants James J. Hill and his associate stockholders of the defendant, the Great Northern Railway Company, owning or controlling a majority of the stock of that corporation, and the defendants J. Pierpont Morgan and his associate stockholders of the defendant, the Northern Pacific Railway Company, owning or controlling a majority of the stock of that corporation, acting for themselves as such stockholders and on behalf of the said railway companies in which they owned or held a controlling interest, on and prior to the 13th day of November, 1901, contriving and intending unlawfully to restrain the trade or commerce among the several States [206] and between said States and foreign countries carried on by the Northern Pacific and Great Northern systems, and contriving and intending unlawfully to monopolize or attempt to monopolize such trade or commerce, and contriving and intending unlawfully to restrain and prevent competition among said railway systems in respect to such interstate and foreign trade or commerce, and contriving and intending unlawfully to deprive the public of the facilities and advantages in the carrying on of such interstate and foreign trade or commerce theretofore enjoyed through the independent competition of said railway systems, entered into an unlawful combination or conspiracy to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce, through the instrumentality and by the means following, to wit: A holding corporation, to be called the Northern Securities Company, was to be formed under the laws of New Jersey, with a capital stock of \$400,000,000, to which, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over and transferred the capital stock, or a controlling interest in the capital stock, of each of the defendant railway companies, with power in the holding cor-

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poration to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stocks. In this manner, the individual stockholders of these two independent and competing railway companies were to be eliminated and a single common stockholder, the Northern Securities Company, was to be substituted; the interest of the individual stockholders in the property and franchises of the two railway companies was to terminate, being thus converted into an interest in the property and franchises of the Northern Securities company. The individual stockholders of the [207] Northern Pacific Railway Company were no longer to hold an interest in the property or draw their dividends from the earnings of the Northern Pacific system, and the individual stockholders of the Great Northern Railway Company were no longer to hold an interest in the property or draw their dividends from the earnings of the Great Northern system, but having ceased to be stockholders in the railway companies and having become stockholders in the holding corporation, both were to draw their dividends from the earnings of both systems, collected and distributed by the holding corporation. In this manner, by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both systems for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established.

VII. In pursuance of the unlawful combination or conspiracy aforesaid, and solely as an instrumentality through which to effect the purposes thereof, on the 13th day of November, 1901, the defendant, the Northern Securities Company, was organized under the general laws of the State of

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New Jersey, with its principal office in Hoboken, in said State, and with an authorized capital stock of \$400,000,000. A copy of the articles of incorporation of such company is attached to and made a part of this petition. Among the purposes and powers designedly inserted in said articles is the purpose and power, not only to "purchase" and "hold" "shares of the capital stock of any other corporation or corporations," under which said company wrongfully claims and is exercising the power to acquire by exchange [208] and hold the stock of the Northern Pacific and the Great Northern railway companies, but the purpose and power, while owner thereof, "to exercise all the rights, powers, and privileges of ownership;" that is, to vote such stock, collect the dividends thereon, and in all respects act as a stockholder of such railway companies; and the purpose and power "to aid in any manner any corporation * * * of which any bonds * * * or stock are held, * * * and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds * * * or stock," meaning thereby to do whatever it may deem necessary to aid in any manner the Northern Pacific and the Great Northern Railway companies, or to preserve or enhance the value of their stocks or bonds.

VIII. In further pursuance of the unlawful combination or conspiracy aforesaid, and solely as an instrumentality through which to effect the purposes thereof, on or about the 14th day of November, 1901, the defendant the Northern Securities Company was organized by the election of a board of directors and the selection of a president and other officers, the defendant James J. Hill, the president and controlling power in the management of the defendant the Great Northern Railway Company, being chosen a director and president thereof; and thereupon, in further pursuance of the unlawful combination or conspiracy aforesaid, the defendants James J. Hill and his associate stockholders of the defendant the Great Northern Railway Company assigned and transferred to the defendant the Northern Securities Company, a large amount of the capital stock of the Great Northern Railway Company, the exact amount being unknown to complainant, but constituting a controlling interest therein, and complainant believes a ma-

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majority thereof, upon the agreed basis of exchange of \$180, par value, of the capital stock of the said Northern Securities Company for each share of the capital stock of the Great Northern Railway Company; and the defendants J. Pierpont Morgan and his associate stockholders of the Northern Pacific Railway Company assigned and transferred to the defendant the Northern Securities Company a [209] large majority of the capital stock of the defendant the Northern Pacific Railway Company, the exact amount being unknown to complainant, upon the agreed basis of exchange of \$115, par value, of the capital stock of the said Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company; and thereafter, in further pursuance of the unlawful combination or conspiracy aforesaid, the defendant, the Northern Securities Company, offered to the stockholders of the defendant railway companies to issue and exchange its capital stock for the capital stock of such railway companies, upon the basis of exchange aforesaid, no other consideration being required. In further pursuance of the unlawful combination or conspiracy aforesaid the defendant the Northern Securities Company has acquired an additional amount of the stock of the defendant railway companies, issuing in lieu thereof its own stock upon the basis of exchange aforesaid, and is now holding, as owner and proprietor, substantially all of the capital stock of the Northern Pacific Railway Company and, as claimant believes and charges, a majority of the capital stock of the Great Northern Railway Company, but if not a majority, at least a controlling interest therein, and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof in the organization, management, and operation of said railway companies, and in the receipt and control of their earnings, and will continue to do so, unless restrained by the order of this court. By reason whereof a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific Railway systems has been affected, a combination or conspiracy in restraint of the trade or commerce among the several States and with foreign nations formerly carried on by the defendant railway companies independently and in free competition one with the other has been

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formed and is in operation, and the defendants are thereby attempting to monopolize, and have monopolized, such interstate and foreign trade or commerce, to the great and irreparable damage of the people of the United [210] States, in derogation of their common rights, and in violation of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

IX. If the defendant the Northern Securities Company has not acquired a large majority of the capital stock of the defendant the Great Northern Railway Company, it is because the individual defendants named, and their associates in the combination or conspiracy charged in this petition, or some of them, since it became apparent that the legality of their corporate device for the merger of the stock of competing railway companies, through the instrumentality of a central or holding corporation, would be assailed in the courts, have purposely withheld, or caused to be withheld, a large amount of the capital stock of said railway company from transfer for the stock of the Northern Securities Company, and have purposely discouraged and prevented the transfer and exchange of such stock for the stock of the Northern Securities Company, all for the purpose of concealing the real scope and object of the unlawful combination or conspiracy aforesaid, and of deceiving and misleading the state and Federal authorities, and of furnishing a ground for the defence that the Northern Securities Company does not hold a clear majority of the stock of the Great Northern Railway Company. The complainant avers that such stock, so withheld or not transferred to the Northern Securities Company, is now in the hands of some person or persons (unknown to the complainant) friendly to and under the influence of the individual defendants named and their associates aforesaid, or some of them, and will either not be voted, or be voted in harmony with the Great Northern stock held by the Northern Securities Company, until the question of the legality of this corporate device for merging competing railway lines shall be finally and judicially determined, when such stock will either be turned over to the Northern Securities Company or continue to be held and voted outside said company but in harmony with the

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Great Northern [211] stock held and voted by it, as may at the time seem advisable.

X. In further pursuance of the unlawful combination or conspiracy aforesaid, the Northern Securities Company (subject, it may be, to the condition stated in the next preceding paragraph) is about to and will, unless restrained by the order of this court, receive and acquire, and hereafter hold and control as owner and proprietor, substantially all of the capital stock of the defendant railway companies, issuing in lieu thereof its own capital stock to the full extent of the authorized issue, of which, upon the basis of exchange aforesaid, the former stockholders of the Great Northern Railway Company have received or will receive and hold about 55 per cent thereof, the balance going to the former stockholders of the Northern Pacific Railway Company.

XI. No consideration whatever has existed, or will exist, for the transfer as aforesaid of the stock of the defendant railway companies from their stockholders to the Northern Securities Company, other than the issue of the stock of the Northern Securities Company to them in exchange therefor, for the purpose, after the manner, and upon the basis aforesaid.

The defendant, the Northern Securities Company, was not organized in good faith to purchase and pay for the stocks of the Great Northern and the Northern Pacific Railway companies. It was organized solely to incorporate the pooling of the stocks of said companies and to carry into effect the unlawful combination or conspiracy aforesaid. The Northern Securities Company is a mere depository, custodian, holder, and trustee of the stocks of the Great Northern and the Northern Pacific Railway companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders in the pool. The Northern Securities Company does not have and never had any capital sufficient to warrant such a stupendous operation. Its subscribed capital was but \$30,000, and its authorized capital stock of \$400,000,000 is just sufficient, when all issued, to [212] represent and cover the exchange value of

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substantially the entire stock of the Great Northern and Northern Pacific Railway companies, upon the basis and at the rate agreed upon, which is about \$122,000,000 in excess of the combined capital stock of the two railway companies taken at par.

XII. If the Government fails to prevent the carrying out of the combination or conspiracy aforesaid, and the defendant, the Northern Securities Company, is permitted to receive and hold and act as owner of the stock of the Northern Pacific and Great Northern Railway companies as aforesaid, not only will a virtual consolidation of two competing transcontinental lines, with the practical pooling of their earnings, be effected, and a monopoly of the interstate and foreign commerce formerly carried on by them as competitors be created, and all effective competition between such lines in the carrying of interstate and foreign traffic be destroyed, but thereafter, to all desiring to use it, an available method will be presented, whereby, through the corporate scheme or device aforesaid, the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," may be circumvented and set at naught, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged, and consolidated, thus placing the public at the absolute mercy of the holding corporation.

XIII. In furtherance of the purpose and object of the unlawful combination or conspiracy aforesaid to monopolize or attempt to monopolize the trade or commerce among the several States, and between such States and foreign countries, formerly carried on in free competition by the defendants, the Northern Pacific and Great Northern Railway companies, and to place a restraint thereon, the individual defendants named and their associate stockholders of the defendant railway companies, have combined or conspired with one another and with other persons (whose names are unknown to the complainant, but whom it prays to have made parties to this action when ascertained) to use and employ, in addition to the corporate scheme [213] or device aforesaid, and in aid thereof, various other schemes, devices, and instrumentalities, the precise details of which are at

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present unknown to the complainant but will be laid before the court when ascertained, by means of which, unless prevented by the order of this court, the object and purpose of the unlawful combination or conspiracy aforesaid may and will be accomplished.

PRAYER.

In consideration whereof, and inasmuch as adequate relief in the premises can only be obtained in this court, the United States of America prays your honors to order, adjudge, and decree that the combination or conspiracy hereinbefore described is unlawful, and that all acts done or to be done in carrying it out are in derogation of the common rights of all the people of the United States and in violation of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and that the defendants and each and every one of them, and their officers, directors, stockholders, agents, and servants, and each and every one of them, be perpetually enjoined from doing any act in pursuance of or for the purpose of carrying out the same, and, in addition, that the several defendants be respectively enjoined as follows:

First. That the defendant, the Northern Securities Company, its stockholders, officers, directors, executive committee, and its agents and servants, and each and every one of them, be perpetually enjoined from purchasing, acquiring, receiving, holding, voting (whether by proxy or otherwise), or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific Railway Company or the Great Northern Railway Company; and that a mandatory injunction may issue requiring the Northern Securities Company to recall and cancel any certificates of stock issued by it in purchase of or in exchange for any of the shares of the capital stock of [214] either of said railway companies, surrendering in return therefor to the holders thereof the certificates of stock in the respective railway companies in lieu of which they were issued.

Second. That the defendant, the Northern Pacific Railway Company, its stockholders, officers, directors, agents, and servants, and each and every one of them, be perpetually

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enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock, and from permitting such company to vote such stock, whether by proxy or otherwise, and from paying any dividends upon such stock to said company or its assigns, unless authorized by this court, and from recognizing as valid any transfer, mortgage, pledge, or assignment by such company of such stock, unless authorized by this court.

Third. That the defendant, the Great Northern Railway Company, its stockholders, officers, directors, agents, and servants, and each and every one of them, be perpetually enjoined from in any manner recognizing or accepting the Northern Securities Company as the owner or holder of any shares of its capital stock, and from permitting such company to vote such stock, whether by proxy or otherwise, and from paying any dividends upon such stock to said company or its assigns, unless authorized by this court, and from recognizing as valid any transfer, mortgage, pledge, or assignment by such company of such stock unless authorized by this court.

Fourth. That the individual defendants named, and their associate stockholders, and each and every stockholder of either of said railway companies who has exchanged his stock therein for the stock of the Northern Securities Company, be each, respectively, perpetually enjoined from in any manner holding, voting, or acting as the owner of any of the stock of the Northern Securities Company, issued in exchange for the stock of either of the said railway companies, unless authorized by this court; and that a mandatory injunction may issue requiring each of the said defendants to surrender any stock of the Northern Securities Company so acquired and held by him, and accept [215] therefor the stock of the defendant railway company in exchange for which the same was issued.

Fifth. That the individual defendants named, and their associate stockholders, and each and every person combining or conspiring with them, as charged in Paragraph XIII hereof, and their trustees, agents, and assigns, present or future, and each and every one of them, be perpetu-

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ally enjoined from doing any and every act or thing mentioned in said paragraph, or in furtherance of the combination or conspiracy described therein, or intended or tending to place the capital stock of the defendant railway companies, or the competing railway systems operated by them, or the competitive interstate or foreign trade or commerce carried on by them, under the control, legal or practical, of the defendant, the Northern Securities Company, or of any person or persons, or association or corporation, acting for or in lieu of said company, in the carrying out of the unlawful combination or conspiracy described in said paragraph.

The United States prays for such other and further relief as the nature of the case may require and the court may deem proper in the premises.

To the end, therefore, that the United States of America may obtain the relief to which it is justly entitled in the premises, may it please your honors to grant unto it writs of subpoena directed to the said defendants, the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, and John S. Kennedy, and their associate stockholders of the Great Northern Railway Company, as their names may become known to complainant and the court be advised thereof, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont, and their associate stockholders of the Northern Pacific Railway Company, as their names may become known to complainant and the court be advised thereof, and the persons referred to in Paragraph XIII hereof, as their names may become known to complainant and the court be advised thereof, and to each of them, commanding them, and [216] each of them, to appear herein and answer (but not under oath) the allegations contained in the foregoing petition, and abide by and perform such order or decree as the court may make in the premises; and that, pending the final hearing of this case, a temporary restraining order may issue enjoining the defendants and their associates, and each of them, and their stockholders, directors, officers, agents, and servants as hereinbefore prayed.

Bill in Equity; exhibit.

The petition was signed and verified by Milton D. Purdy, Attorney of the United States for the District of Minnesota, and also signed by Philander C. Knox, Attorney-General of the United States, and John K. Richards, Solicitor-General of the United States.

Annexed to the petition as an exhibit was the charter of the Northern Securities Company, as follows:

CERTIFICATE OF INCORPORATION OF NORTHERN SECURITIES COMPANY.

STATE OF NEW JERSEY, ss.:

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the act of the legislature of the State of New Jersey entitled "An act concerning corporations" (revision of 1896), and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

First. The name of the corporation is Northern Securities Company.

Second. The location of its principal office in the State of New Jersey is at No. 51 Newark street, in the city of Hoboken, county of Hudson. The name of the agent therein, and in charge thereof, upon whom process against the corporation may be served, is Hudson Trust Company. Such office is to be the registered office of the corporation.

Third. The objects for which the corporation is formed are:

(1) To acquire by purchase, subscription, or otherwise, and to hold as investment, any bonds or other securities or evidences of [217] indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country.

(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner thereof to exercise all the rights, powers, and privileges of ownership.

(3) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory, or country, and while owner of such stock to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon.

(4) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds or other securities or evidences of indebtedness or stock.

(5) To acquire, own, and hold such real and personal property as may be necessary or convenient for the transaction of its business.

The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

The corporation shall have power to conduct its business in other States and in foreign countries, and to have one or more offices out of this State, and to hold, purchase, mortgage, and convey real and personal property out of this State.

Fourth. The total authorized capital stock of the corporation is four

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hundred million dollars (\$400,000,000), divided into [218] four million (4,000,000) shares of the par value of one hundred dollars (\$100) each. The amount of the capital stock with which the corporation will commence business is thirty thousand dollars.

Fifth. The names and post-office addresses of the incorporators, and the number of shares of stock subscribed for by each (the aggregate of such subscriptions being the amount of capital stock with which this company will commence business), are as follows:

| Name and post-office address. | Number of shares. |
|---|-------------------|
| George F. Baker, jr., 258 Madison avenue, New York, N. Y. | 100 |
| Abram M. Hyatt, 214 Allen avenue, Allenhurst, N. J | 100 |
| Richard Trimble, 53 East Twenty-fifth street, New York, N. Y. | 100 |

Sixth. The duration of the corporation shall be perpetual.

Seventh. The number of directors of the corporation shall be fixed from time to time by the by-laws; but the number, if fixed at more than three, shall be some multiple of three. The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one-third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year, the directors of the second class for a term of two years, and the directors of the third class for a term of three years; and at each annual election the successors to the class of directors whose term shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

In case of any increase of the number of the directors the additional directors shall be elected as may be provided in the by-laws, by the directors or by the stockholders at an annual or special meeting, and one-third of their number shall be elected for the then unexpired portion of the term of the directors of the first class, one-third of their number for the unexpired portion [219] of the term of the directors of the second class, and one-third of their number for the unexpired portion of the term of the directors of the third class, so that each class of directors shall be increased equally.

In case of any vacancy in any class of directors through death, resignation, disqualification, or other cause, the remaining directors, by affirmative vote of a majority of the board of directors, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of a successor.

The board of directors shall have power to hold their meetings outside the State of New Jersey at such places as from time to time may be designated by the by-laws, or by resolution of the board. The by-laws may prescribe the number of directors necessary to constitute a quorum of the board of directors, which number may be less than a majority of the whole number of the directors.

As authorized by the act of the legislature of the State of New Jersey passed March 22, 1901, amending the seventeenth section of the act concerning corporations (revision of 1896), any action which theretofore required the consent of the holders of two-thirds of the stock at any meeting after notice to them given, or required their consent

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In writing to be filed, may be taken upon the consent of, and the consent given and filed by, the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy.

Any officer elected or appointed by the board of directors may be removed at any time by the affirmative vote of a majority of the whole board of directors. Any other officer or employé of the corporation may be removed at any time by vote of the board of directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws or by vote of the board of directors.

The board of directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum, [220] and to such extent as shall be provided in the by-laws such committee shall have and may exercise all or any of the powers of board of directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The board of directors may appoint one or more vice-presidents, one or more assistant treasurers, and one or more assistant secretaries, and, to the extent provided in the by-laws, the persons so appointed, respectively, shall have and may exercise all the powers of the president, of the treasurer, and of the secretary, respectively.

The board of directors shall have power from time to time to fix and determine and to vary the amount of the working capital of the corporation; to determine whether any, and if any, what part of any accumulated profits shall be declared in dividends and paid to the stockholders; to determine the time or times for the declaration and payment of dividends, and to direct and to determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the board of directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations, or shares of the capital stock of the corporation to such extent and in such manner and upon such terms as the board of directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the capital stock of the corporation to the extent authorized by law.

The board of directors, from time to time shall determine whether and to what extent, and at what times and places and under what conditions and regulations, the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholders shall have any right to inspect any account or book or document of the corporation except as conferred by statute of the State of New Jersey, or authorized by the board of directors or by a resolution of the stockholders.

[221] The board of directors may make by-laws, and from time to time may alter, amend, or repeal any by-laws; but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting or at any special meeting, provided notice of such proposed alteration or repeal be included in the notice of the meeting.

In witness whereof we have hereunto set our hands and seals the 12th day of November, 1901.

Signed, sealed and acknowledged by Geo. F. Baker, Jr., Abram M. Hyatt and Richard Trimble.

The answer of the Northern Securities Company to the petition of the United States of America, was as follows:

I. This defendant admits and avers that the defendant

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railway companies were, at the time mentioned in the petition, and are now common carriers employed in transportation of freight and passengers within and among those States of the United States in which the railways operated by them are situated, and not further or otherwise, but were and are engaged in commerce among the several States and with foreign nations.

II. This defendant admits that, on and prior to November 13, 1901, the capital stock of the defendant railway companies was owned and controlled by their respective shareholders, and it avers, on information and belief, that the outstanding capital stock of the Great Northern Railway Company was owned by more than eighteen hundred (1,800) separate owners, and the outstanding capital stock of the Northern Pacific Railway Company was owned by more than thirty-five hundred (3,500) separate owners; and that among the shareholders of the Great Northern Railway Company (hereinafter called the Great Northern Company) were the defendants Hill, Clough, James, Morgan, and Kennedy; and that among the shareholders of the Northern Pacific Railway Company (hereinafter called the Northern Pacific Company) were the defendants Morgan, Bacon, Baker, Hill, Kennedy, James, and Lamont. It avers that the persons named and meant to be designated in the peti- [222] tion as owning, controlling, or as being associated in the ownership and control of a majority of the stock of the Great Northern Company, did not at any time, nor in any manner, own or control a majority of said stock, nor as much as one-third ($\frac{1}{3}$) part thereof. Their holdings in said stock were at all times separate and individual, and not in association with each other, or with any other person or persons, and neither of them was under any obligation or promise to any of the others, or to any other person, to hold, use, or vote his stock otherwise than as he should, from time to time, determine to be best for his own individual interest. The persons named and meant to be designated in the petition as owning, controlling, or as being associated in the ownership and control of a majority of the stock of the Northern Pacific Company, did not, at the date named, nor at any time, or in any manner, own or control a majority of such stock, nor as much as one-third ($\frac{1}{3}$) part

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thereof. Their holdings in said stock were at all times separate and individual, and neither of them had any control of the holdings of the other, or of any other person or persons, and neither of them was under any promise of obligation to the other, or to any person, to hold, use or vote his stock otherwise than as he should, from time to time, determine to be best for his own individual interest.

Except as herein admitted and averred, this defendant denies each and every allegation of subdivision II of the petition.

III. This defendant admits that the Northern Pacific Company owned and operated a railway from Ashland, in Wisconsin, via Duluth, and from St. Paul, across Minnesota, North Dakota, Montana, Idaho, and Washington, and into Oregon, passing through Helena, in the State of Montana, and Spokane, in the State of Washington, and extending to Tacoma and Seattle in Washington, and to Portland in Oregon; and that the Great Northern Company operated lines of railway extending from St. Paul, in the State of Minnesota, across said State and North Dakota, Montana, Idaho, and Washington to Everett and Seattle in Washington, passing through Spokane in that State.

[223] It admits that the said lines so operated by said companies connected with other railway lines, and that, either directly or by means of such other railway lines, they connected with lines of steamships on the Great Lakes and the ocean; and that the mileage operated by said companies aggregated about fifty-five hundred (5,500) miles for the Northern Pacific Company and about forty-one hundred and twenty-eight (4,128) miles for the Great Northern Company.

It denies that the lines operated by said companies are parallel or competing, except for the short distances and to the limited extent hereinafter mentioned, and denies that said companies were engaged in active competition with each other, except in the manner and to the extent hereinafter stated.

Except as hereinabove and hereinafter stated, it denies each and every allegation in subdivision III of said petition.

IV. This defendant admits and avers that prior to 1893 those portions, and those portions only, of the lines of the

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Northern Pacific Company which had been built and were operated by virtue of the act of Congress incorporating the Northern Pacific Railroad Company, approved July 2, 1864, were owned and operated by the last-named company, and that in the year 1893 that company became insolvent and its lines passed into the hands of receivers appointed by various Federal courts.

It admits that while in this condition a contract was made, as set forth in the report of the *Pearsall* case, referred to in the petition. It avers that said contract was made under and in conformity with the provisions of the act of incorporation of the Great Northern Company, and that the only objection made to the validity of the contract was that the provisions in said charter under which it was made had been repealed by subsequent general laws of the State. It denies that the case, or that the decision therein, is correctly stated in the petition. And it avers that neither the said contract nor the issues raised and decided in the said case have any relevancy to the matters in controversy in this case.

V. This defendant admits and avers that in the winter and [224] spring of 1901 the defendant railway companies, for the purpose of promoting their several interests and the interests of the country traversed by their lines and by those of the Chicago, Burlington and Quincy Railroad Company, purchased in equal parts the stock of the last-named company to the amount and at the price and upon the terms of payment stated in the petition. It admits that the lines operated by the Chicago, Burlington and Quincy Railroad Company and its connections are substantially as stated in the petition. It denies that what is called in the petition the Burlington system was or is parallel to or competing with what is therein called the Union Pacific system, but admits that some of the lines of each system compete with some lines of the other.

It denies that said purchase of stock was made in contemplation of the ultimate placing of the Great Northern and Northern Pacific systems under a common source of control, or that it was made for any other motive or with any other purpose than as hereinafter stated.

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Except as herein admitted, it denies each and every allegation in subdivision V of the petition.

VI. This defendant denies that prior to its organization the defendants James J. Hill or J. Pierpont Morgan, or said Hill and Morgan, or any persons associated with them, or either of them, owned or controlled a majority of, or held a controlling interest in, the stock of either of said railway companies.

It denies that said persons, or that any of the persons concerned in its organization, contrived or intended any of the things alleged in subdivision VI of the petition or entered into any agreement or conspiracy to do any of the things charged in said subdivision.

It admits and avers that said James J. Hill and other holders (not exceeding ten in number) of the stock of the Great Northern Company, but not including the defendants Morgan, Bacon, or Lamont, did plan its organization with an authorized capital of four hundred million dollars (\$400,000,000) for the purposes, and those only, set forth in its certificate of incorporation. [225] It denies that James J. Hill and J. P. Morgan agreed between themselves, or with other stockholders of either of the defendant railway companies, or with either of said railway companies, or with anyone whomsoever, that a controlling interest of the stock of either of said railway companies should be turned over or transferred to this defendant, whether in exchange for its stock or otherwise.

It denies that any of the matters stated in said subdivision VI of the petition were contemplated or intended, or have resulted, or will result, from its formation and operation. And it denies the allegation that it is the duty of the directors of said railway companies to pursue a policy which will promote the interest of both systems at the expense of the public.

It alleges that the motives and intentions of the persons so forming this defendant were and are such, and such only, as are in this answer stated, and it denies each and every allegation in subdivision VI of the petition not herein expressly admitted or specifically denied.

VII. This defendant admits its formation under the laws of New Jersey, with the articles, a copy of which is attached

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to the petition, and that the provisions of said articles were designedly inserted therein and were fully authorized by the general corporation laws of that State. And it says that the exercise of the powers of a stockholder provided for in said articles was not, as wrongly stated in the petition, confined to the stock of the defendant railway companies which this defendant might hold. It avers that the clause in said articles, partially quoted in paragraph VII of the petition, was not intended to, and does not, enlarge its powers, as the same are set forth in the preceding clauses of said articles, but makes clear its power to do such acts as making or procuring advances of money to any corporation whose securities are held by it, the indorsement or guaranty by it of the obligations of such corporation, becoming surety therefor, or in any lawful manner using its name or resources in aid of such corporation.

VIII. This defendant admits and avers that on or about the [226] 14th day of November, 1901, its directors and officers were elected, and among them the defendant James J. Hill as a director and president, but denies that he was or is the controlling power in the management of the Great Northern Company.

It admits and avers that thereafter the defendant James J. Hill and other stockholders of the Great Northern Company, severally and each acting for himself alone, and without any agreement to that effect with any other stockholder, sold to this defendant a large amount of Great Northern stock at one hundred and eighty dollars (\$180) per share in exchange for stock of this defendant at par, but it avers that the stock so sold was not within twenty-six million dollars (\$26,000,000) of a majority of the stock of the Great Northern Company.

It admits and avers that thereafter and about November 22, 1901, it offered like terms of purchase to the other shareholders of the Great Northern Company, the offer to hold good for sixty days from its date, and that many of the shareholders of that company, each acting for himself alone, accepted such offer and made such sale.

It admits and avers that the defendant J. P. Morgan and other shareholders of the Northern Pacific Company sold to the defendant a majority of the stock of the Northern Pacific Company; and that this defendant has received such divi-

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dends as have been paid on the shares held by it, in the same manner and at the same rate as other shareholders; but it denies that it has acted, whether as owner of stock or otherwise, in the management or direction of either of said railway companies or in receipt or control of the earnings of either of them, and it avers that no change whatever has taken place in the management of the said railway companies, or either of them, and that each of them is managed by the same board of directors and officers as existed before the organization of this defendant.

It denies that any of the things done by the defendants James J. Hill and J. Pierpont Morgan, or by either of them, or by this defendant or its promoters, directors, officers, or stockholders, or any of them, were done in pursuance of the pre- [227] tended combination or conspiracy alleged in subdivision VIII of the petition, or as an instrumentality to effect the purposes thereof, and it denies that by reason of the matters or any of them in the petition alleged a virtual or any consolidation of said defendant railway companies or their business has been effected or intended; and it denies any conspiracy or combination in restraint of trade or commerce among the States, or with foreign nations, or that the defendants or any of them are attempting or intending to monopolize or restrain any such trade or commerce.

IX. It denies each and every allegation in subdivision IX of the petition.

X. This defendant says that it does not know and cannot set forth how much additional stock of either defendant railway company it is likely to acquire, since each acquisition of shares by it depends, among other contingencies, on the willingness of the holders of the said stock to sell it upon terms which this defendant may be willing to accept.

XI. This defendant says it has bought and paid for and has caused to be transferred to it upon the records of the Great Northern Company, in accordance with the by-laws of that company, about five-twelfths ($\frac{5}{12}$) of the shares of that company's stock; and has also negotiated for, but has not yet caused to be presented to the Great Northern Company for transfer upon its records, other shares of the stock of that company aggregating about four-twelfths ($\frac{4}{12}$) of the total

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amount of its stock, but has not acquired a right to vote as stockholder of the Great Northern Company on stock not so transferred. This defendant, in acquiring shares of the Great Northern Company and of the Northern Pacific Company, dealt solely with the separate owners of the said shares in their respective individual capacities. It has no knowledge of any agreement, promise, or understanding between any of the holders of said stock concerning the sale thereof to it, and it denies that any such agreement, promise, or understanding was ever made. All the sales and transfers of the said stock to this defendant [228] were absolute and without any reservation of any right or interest in any share thereof to the seller or to any other person.

This defendant has not paid for all the stock of the Great Northern Company and of the Northern Pacific Company acquired by it in shares of its own stock, but, on the contrary, has expended upward of forty million dollars (\$40,000,000) cash in the making of such purchases. Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and so long as it remains the property of this defendant will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders or officers, that the same shall be held, owned, or kept by it for any period of time whatever, or under any agreement that in any manner restricts its right and power immediately to sell or otherwise dispose of the same, or that restricts or controls to any extent any use of the same, which might lawfully be exercised by any other owner of said stocks. There has been and is no agreement, promise, or understanding between any of the holders of said stock so acquired by this defendant, or between any of them and any other person or corporation, that any of said shares should at any time be held, used, or voted by this defendant for the purpose of combining or consolidating or placing under one common management or control the railways of the Great Northern Company and of the Northern Pacific Company, or the business thereof, or for the purpose of monopolizing or restraining traffic or competition between the said railways. Many

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stockholders of the said companies have not sold, and may never sell, their shares to this defendant; and the said railway companies have not nor have any of the directors of either of them, by any act, formal or informal, or by suggestion, ever solicited any of their respective shareholders to sell their shares to this defendant. This defendant was organized in good faith, and it denies all the allegations in subdivision XI of the petition.

[229] XII. This defendant denies each and every allegation in subdivision XII of the petition.

XIII. This defendant denies each and every allegation in subdivision XIII of the petition.

SECOND.

Further answering the petition, this defendant, upon information and belief, says that the facts as to the purchase of the shares of the Chicago, Burlington and Quincy Railroad Company (hereinafter called the Burlington Company) and the planning and forming of this defendant and the motives, intentions, and purposes of the persons and corporations concerned in these enterprises, or either of them, were not as erroneously stated in the petition, but were and are as follows:

I. When projecting the line of the Great Northern Company to the Pacific coast, that company and its directors contemplated the necessity of creating for the line not merely State and interstate, but an international commerce. Nearly all the country traversed or reached by the line was then but sparsely settled or not settled at all. It was principally agricultural, grazing, or timber land, with mineral deposits in the mountain ranges believed to be large and valuable, but not developed or explored. Whatever commodities the region might furnish for carriage would be raw material, of great weight and bulk in proportion to its value, which would not bear transportation to market except at a low mileage rate, such as could be made possible only by every practical reduction in the cost of transportation. The available market for all such products was far from the places of production.

In Washington and Oregon are the largest and finest bodies of standing timber in the United States, the best market for

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which is in the prairie States of the Mississippi Valley east of the Rocky Mountains; but the lumber and shingles from the Pacific coast would not bear the cost of transportation to those States if the cars carrying them had to be hauled back empty, or nearly so, for a distance of from 1,500 to 2,000 miles. And [230] the same is true of the other products. On the other hand, the unoccupied or sparsely populated country along the line, or reached by it, could not furnish a market for commodities enough to load the returning cars; the result being that unless the company could secure traffic for carriage beyond the Pacific coast no great traffic either way could exist or be created.

To meet these conditions the Great Northern Company not only went to great additional expense in the construction of its line to obtain gradients lower than those of any other line to the Pacific coast, but also made great efforts to create and increase in the countries of eastern Asia a demand for the products of this country; and soon after the completion of its railway in 1893 it induced a Japanese company to run a line of steamships, connecting with its railway, on the route between Seattle and ports of Japan, China, and Russian Siberia, and succeeded in creating and has since been actively engaged in building up a commerce in which the flour manufactured along its line, cotton (both raw and manufactured), iron and steel (especially steel rails and plates), machinery, and such other manufactures of this country as a market could be found or made for in eastern Asia, have been carried to oriental ports, and return cargoes of such oriental products as are consumed in this country have been brought back. A large west-bound, as well as an increased east-bound, traffic has thus been secured by the company, enabling it to make such rates on lumber and other products of the country served by it as permit them to be shipped to Eastern markets with a profit to the shippers.

One year before the Burlington purchase, this oriental traffic had reached such proportions that the Great Northern Company caused to be begun the construction of steamships to run from Seattle to ports in Japan, China, and the Philippines, which, from their great carrying capacity (being the

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largest in the world), will be able to carry at very low rates (if full cargoes can be secured), and thus enable the company to move the largest volume of west-bound traffic (and also of east-bound traffic) at the lowest cost.

[231] In the interstate and international commerce which the Great Northern Company has thus built up, it competes both in this country and on the ocean with the other transcontinental lines (including the Canadian Pacific), and at the oriental ports it competes for commerce of the world. Its rates are and must be made in competition with the rates of ocean carriers and by way of the Suez Canal.

The policy thus followed by the Great Northern Company in building up an international, and thereby interstate, commerce has been followed by the Northern Pacific Company since its reorganization in 1896.

In creating and maintaining this competitive interstate and international commerce both the Great Northern Company and the Northern Pacific Company were hampered and placed at a disadvantage with the other transcontinental railways, as well as with European competitors, by the want of sufficient direct connection with the territory offering the best markets for the products of the country along their lines, and with the places of production and great centers of distribution from which their traffic must be supplied. For many months before the purchase of the Burlington shares they had considered the best means of getting closer to such markets and sources of supply. The lines of the Burlington, better than those of any other company, fulfilled the requirements of both the Great Northern Company and the Northern Pacific Company in respect of markets for east-bound and freight for west-bound traffic. The Burlington lines traverse the treeless States of Illinois, Iowa, Missouri, Nebraska, Wyoming, Kansas, and Colorado, which afford the best markets for the lumber of the Pacific coast. They reach Denver, Kansas City, Omaha, and Aurora, where are located the principal smelters of silver-lead ores, such as are mined near the lines of the defendant railway companies.

They reach Omaha, Kansas City, and Chicago, where are the great packing houses and the great markets for the cattle

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and sheep of the ranges of North Dakota, Montana, Wyoming, Idaho, Oregon, and Washington.

[232] They reach St. Louis and Kansas City, connecting there with lines traversing the cotton States, from which come raw and manufactured cotton required for shipment to China and Japan.

At Chicago and St. Louis they connect with the lines which reach the points of supply of manufactured iron, steel, machinery, and other manufactured articles that find a market in Japan and China.

The Burlington line southward from Minneapolis and St. Paul along the Mississippi River reaches the great coal deposits of southern Illinois, the largest west of Pennsylvania and West Virginia; and its light gradients and consequent low cost of transportation make it possible to supply such coal to points on the lines of each defendant railway company east of the Mississippi River, relieving the people and the railways of that territory from entire dependence upon the Pennsylvania and West Virginia mines, the supply from which is yearly becoming more costly and less certain.

The price paid for said Burlington stock was lower per mile of main track covered by the stock than that for which the stock of any other large and well established system in the same general territory could have been bought.

The purchase of the Burlington stock by the Northern Pacific and Great Northern companies in equal parts served each company as well as if it were the sole owner of such stock, while such purchase might have been beyond the financial means of either company by itself.

The Great Northern and Northern Pacific companies therefore each purchased an equal number of shares of the Burlington stock as the best means and for the sole purpose of reaching the best markets for the products of the territory along their lines, and of securing connections which would furnish the largest amount of traffic for their respective roads, increase the trade and interchange of commodities between the regions traversed by the Burlington lines and their connections and the regions traversed or reached by the Great Northern and Northern Pacific lines, and by their connecting lines of shipping on [233] the Pacific coast. These

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connections and such interchange of traffic were deemed to be and are indispensable to the maintenance of their business, local as well as interstate, and to the development of the country served by their respective lines, and of like advantage to the Burlington lines and the country served by them, and strengthen each company in the competition with the more southerly lines to the Pacific coast, with the Canadian Pacific Railway, and with European carriers, for the trade and commerce of the Orient.

In such purchase there was no purpose to lessen any competition of the Burlington lines with those of either of the purchasers, for they are not competitive, or to lessen any competition between the purchasers. Such purchase was not intended to have, and it cannot have, any such effect.

The purchase of the Burlington stock was not made in view of the formation of this defendant, but solely from the motives and with the purposes already stated.

II. The project of forming a holding company of any kind was not the result, in any way, of the failure of the plan which was defeated by the decision of the Supreme Court in the *Pearsall* case. There was no connection whatever between the two.

The project of a holding company which finally developed into the formation of this defendant had its inception years before that date, among several gentlemen, not exceeding ten in number, who had been large shareholders in the Great Northern Company and its predecessor, the St. Paul, Minneapolis and Manitoba Railway Company; some of them from the original organization of the latter company in 1879, and others from dates not long after that time. They have never held a majority of the stock of the Great Northern Company, but have taken an active interest in its policy and administration; have aided it when necessary in financing its operations; have acted together in promoting its interests; have, with some exceptions, served from time to time as directors and officers (Mr. Hill having been president of the successive companies since 1882); and by reason of their active interest in the company and service [284] ices to it have influenced to a large degree its policy and management. As far back as 1893, most of these gen-

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lemen being well advanced and some far advanced in years, they began to discuss together what would be the effect upon the policy which under their influence the company had pursued with great benefit to its shareholders and the public, should their holdings by death or otherwise become scattered, and by what means their holdings could be kept together, so as to secure the continuance of such policy in the management of the company. It was considered that if a company should be formed to which they might transfer their individual holdings, their shares were likely to be held together, so long as the majority in the holding company should so wish, and this would tend to give stability to the policy of the Great Northern Company, be of aid to it in financial operations, and maintain the value of their investments. These conclusions were the result of various consultations among the persons mentioned, or some of them, but no definite agreement was made for forming such a company or binding anyone to transfer his shares to it if formed.

From time to time, beginning with the reorganization of the Northern Pacific Company in 1896, Mr. Hill and said other Great Northern shareholders who had discussed with him the plan of forming a holding company, had made large purchases of Northern Pacific shares, individually, each for himself, without any concerted action, and solely as investments. About May 1, 1901, their aggregate holdings of the common stock of the Northern Pacific Company amounted to nearly twenty million dollars (\$20,000,000) of the eighty million dollars (\$80,000,000) common stock of the company, which also had a preferred stock, amounting to seventy-five million dollars (\$75,000,000), with the same voting power as the common stock. At this time the firm of J. P. Morgan & Co. held about six million dollars (\$6,000,000) of the common stock. In the fall of 1900 Mr. Hill and said Great Northern shareholders discussed the question of putting their holdings of Northern [235] Pacific stock into the proposed holding company, as well as the suggestion that all the other stockholders of the Great Northern Company should be given the opportunity of selling and transferring their shares to the holding company,

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and that its capital stock should be made large enough to enable it to buy such holdings, though it was not known that the holders of any considerable amount of Great Northern stock, other than those above named, would desire to make such transfer.

At the time of the purchase of the Burlington shares it was not contemplated by either purchasing company or its shareholders that any alliance between the purchasing companies, or among their shareholders, was needed to preserve to each company its fair share of the advantages secured by the purchase. It was thought that the manifest interest of each company rendered any further guaranty or security needless. But pending or just after the conclusion of the negotiations for the Burlington stock, parties acting in the interest of the Union Pacific Railway system did purchase Northern Pacific shares, both common and preferred, to the amount of about seventy-eight million dollars (\$78,000,000), being a clear majority of the entire capital stock of that company. The apparent intent of such purchase was to defeat and, if successful, it would have defeated, the carrying out of the purposes for which the Burlington shares had been bought by the Great Northern and Northern Pacific companies, and the development of the interstate and international commerce of each of them, and would have subordinated the policy of each to an interest adverse to both the Great Northern and Northern Pacific companies, and to the public served by their lines.

To protect the interests of the shareholders of the Northern Pacific Company, J. P. Morgan & Co. made additional purchases of Northern Pacific common stock, which, with the holdings in said stock of Mr. Hill and other Great Northern shareholders who had discussed with him the plan of forming a holding company, constituted about forty-two million dollars (\$42,000,000), being a majority of the common stock. In [236] view of the injury apprehended to both companies, and to their shareholders, and the better to protect their interests in the future, the Great Northern shareholders holding Northern Pacific shares, deemed it advisable that the projected holding company should have power to purchase not only their own Great Northern and Northern

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Pacific shares, but also the shares of such other Great Northern and Northern Pacific shareholders as might wish to sell their stock to said holding company, and the shares of companies already formed, and others that might be formed, for the purpose of aiding the traffic or operations of the Great Northern and Northern Pacific companies, respectively. At this time it was not expected by any of the persons concerned that any Northern Pacific shares except the said forty-two million dollars (\$42,000,000) would be acquired by the proposed holding company. The organization of such company was not dependent on any agreement that it should acquire a majority of the shares of either defendant railway company. It would have been organized if the Burlington purchase had not been made, and if its promoters had had no other shares to transfer to it than the thirty-four million dollars (\$34,000,000) Great Northern stock and the twenty million dollars (\$20,000,000) Northern Pacific stock held by them on May 1, 1901. It was not known that all or how many of the shareholders of either of the railway companies would be likely to transfer their shares to this defendant when formed. After its organization this defendant bought and still holds about one hundred and fifty million dollars (\$150,000,000) of the stock of the Northern Pacific Company; and it has also purchased and negotiated for the purchase of the stock of the Great Northern Company, as hereinbefore stated. Neither the said persons who were concerned in the formation of this defendant, nor the said persons from whom it has acquired the stocks of said railway companies, nor this defendant itself since its formation, nor its stockholders, directors, or officers, have planned or intended that the stock of said railway companies acquired by this defendant, or any part thereof, should be held, used, or voted by [237] it, or by its officers, agents or proxies, for the purpose of combining, consolidating or placing under one common management or control the railways of the Great Northern and Northern Pacific companies, or the business thereof; or for the purpose of monopolizing or restraining competition between the said railway companies; or for any other purpose than the election by each of said railway companies of a competent and distinct board of directors, able and intending to manage

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each of them independently of the other, and for the benefit of their shareholders and of the public. By the acts of the legislature of the State of Minnesota incorporating the Great Northern Railway Company, and by the acts of the legislature of the State of Wisconsin incorporating the Northern Pacific Railway Company, it is, in substance, provided that the business and affairs of each railway company shall be managed by a board of directors to be elected by the stockholders, and that all the powers of each corporation relating to said matters shall be vested in such board.

Every share of stock issued by this defendant has been issued to the persons and corporations receiving the same in good faith, for full value paid to it, either in cash or its equivalent, and in accordance with the provisions of its articles of incorporation and with the laws of the State of New Jersey. No agreement, promise, or understanding has been made between this defendant and any of its stockholders, or between its stockholders themselves or any of them, or between said stockholders or any other persons or corporations, that the stock of this defendant should be held, used, or voted other than by each stockholder, separately and individually, and in such way as he should see fit; and there has been no agreement, promise, or understanding between said stockholders themselves, or any of them, or between said stockholders and any other person or corporation, that they or any of them should use, hold, or vote their stock in this defendant in association or for any common purpose or object. The owners and holders of stock of this defendant are more than thirteen hundred (1,300) in number, and the owner- [238] ship of the stock is being changed from day to day by sales and transfers in the usual course of dealing. The said persons who formed or were otherwise concerned in the formation of this defendant have never, all together, held, owned or otherwise controlled an amount of stock of the said company equal to so much as one-third of the whole amount thereof now outstanding. This defendant has no contract or obligation to purchase or acquire any shares whatever in either railway company, in addition to those which it has purchased or negotiated to purchase, as above stated. Its authorized capital was fixed by per-

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sons who planned its organization to enable it to give to each stockholder in each of the defendant railway companies an opportunity to sell his stock to it, should he see fit to do so, and should this defendant desire to acquire it. The sum fixed was deemed ample by those who planned the formation of this defendant to furnish the means to pay for all such shares as would likely be acquired by it, and to leave remaining a large amount to be used for the purchase of stock in other corporations, not common carriers, which this defendant might consider beneficial to acquire. This defendant was not formed as a scheme or a device to evade the act of Congress known as the "Anti-Trust Act," or any other law whatever, but solely for the purposes hereinbefore stated.

III. This defendant was not formed, nor did any of those concerned in its formation, nor any of those who sold their shares of stock to it, have any purpose or intention, to restrain trade or commerce, or to lessen competition between said railway companies, or to monopolize traffic in any manner whatever; nor can any such results follow from the formation or operation of this defendant. In point of fact, since the organization of this defendant rates on the defendant railway companies' lines, including rates to and from points common to both, have voluntarily been so reduced as to decrease their earnings by upwards of a million of dollars annually. For all interstate commerce on the lines of either the defendant railway companies, except traffic beginning and ending on their own lines [239] respectively, the rates are fixed by joint tariffs with connecting lines. In respect to all such traffic neither of the defendant companies has ever had, or can have, any independent rate-making power or control of traffic or rates. All joint tariffs with other companies to or from points common to the lines of the defendant railway companies have always been, and necessarily must be, the same, whether the traffic is carried by one or the other of said companies. The total amount of all other interstate traffic, that is, traffic between common points on the two roads, which is not competitive both as to rates and quality of service with other carriers having equal

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rate-making power with them, is less than 2 per cent of the total interstate traffic of the two companies.

IV. The sale and transfer of property, whether in the form of shares of corporate stock or otherwise, has never been adjudged to be, and is not, in violation of the act of Congress of July 2, 1890, known as the "Anti-Trust Act."

This defendant is not a railroad company, and it has no power to operate or manage railways or make or control rates of transportation, nor to monopolize or restrain traffic of any kind. So far from intending to violate any provision of said act of Congress, the persons who were concerned in organizing this defendant and those who have sold their shares to it had every reason to believe and did believe that such sales were not in any way in contravention of that act. In common with the general public, they were aware that during the eleven years since the passage of that act in many instances the stock of a competing railway company has been acquired by its competitor or the shareholders thereof, such acquisition including many of the principal railways doing business throughout the country. This has been done without objection from any branch of the Government of the United States, and has invariably proven beneficial to the railway companies concerned and to the public, and those making sales of stocks to this defendant had no reason to believe that such sales were open to any legal objection or question whatever.

[240] V. This defendant was not organized for the purpose of acquiring a majority of the stock of either the Great Northern or the Northern Pacific Company, but merely to purchase the stock of those who wished to sell, as above stated, and was not organized for the purpose of controlling railway rates in the slightest degree, and has not had and cannot have any such effect. The transactions referred to in the petition have consisted in the organization of a lawful corporation and the purchase of property by it. All acts done in relation to the organization of this defendant and in the conduct of its business have been expressly authorized by law, and have had no effect whatever to restrain trade or commerce among the several States or with foreign nations. If these lawful transactions should hereafter have any effect to restrain trade or commerce among the several States or

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with foreign nations (which is hereby denied), that effect would be merely indirect, remote, incidental, and collateral, and not intended, and as nothing compared with the great expansion of the volume of interstate and international commerce which was intended, and which this defendant believes is destined to result from the enterprise of the two railway companies, that culminated in the purchase of the Burlington stock.

And this defendant says:

1. The "Anti-Trust Act" was not intended to prevent or defeat an enterprise in aid of a great competitive interstate and international commerce merely because such enterprise may carry with it the possibility of incidental restraint upon some commerce, trifling both as respects territory and volume.

2. Nor was the act intended to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own, and sell their stock.

3. Otherwise construed, the act would be unconstitutional, because:

The power to regulate commerce with foreign nations and [241] among the States does not give Congress the power to regulate any of the matters above mentioned in respect to corporations created by the States; and because

Persons may not be deprived of their property without due process of law, by taking from them the right to sell it as their interest may suggest.

VI. There is a defect of necessary parties defendant, because, as already set forth, the persons who made sales of stock of the said railway companies to this defendant were numerous, exceeding more than 1,300 in number, and few of them had any connection whatever in the planning or forming of this defendant, and in their absence from this litigation no decree can be made affecting their rights in the premises.

VII. And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained mate-

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rial or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, the same is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

Signed (no verification) for the Northern Securities Company, by John W. Griggs and Geo. B. Young, solicitors and counsel.

A separate answer was filed by the defendants James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, and George F. Baker, which was substantially the same as the answer of the defendant Northern Securities Company.

The answer of the Great Northern Railway Company was substantially the same as that of the Northern Securities Com- [242] pany with the omission of Paragraph II of the second statement of defence.

The answer of the defendant the Northern Pacific Railway Company was as follows:

I. This defendant admits the allegations of Paragraph I of the petition that this defendant and the Great Northern Railway Company were at the times mentioned in said petition and now are common carriers employed in the transportation of freight and passengers among the several States of the United States within which the railways operated by them are situated.

This defendant denies each and every other allegation of paragraph I of the petition.

II. This defendant admits the allegations of Paragraph II of the petition that prior to November 13, 1901, the stock of this defendant was owned and controlled by its shareholders, and that among them were the parties in that behalf alleged.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of Paragraph II of the petition.

III. This defendant admits the allegations of Paragraph III of the petition that this defendant at the times men-

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tioned owned and operated a railway extending from Ashland in Wisconsin via Duluth, Minnesota, and from St. Paul, Minnesota, across Minnesota, North Dakota, Montana, Idaho, and Washington, passing through Helena, in the State of Montana, and Spokane, in the State of Washington, and extending to Tacoma and Seattle, in Washington, and to Portland, in Oregon; that the Great Northern Company operated lines of railway extending from St. Paul aforesaid across Minnesota, North Dakota, Montana, Idaho, and Washington, passing through Spokane and extending to Everett and Seattle, in the State last aforesaid; that the said lines connected with other railway lines, and either directly or by means of such other railway lines connected with lines of steamships on the Great Lakes and the ocean, and that the mileage operated by said companies aggregated about five thousand five hundred miles for this defendant [243] and about four thousand one hundred and twenty-eight miles for the Great Northern Company.

This defendant denies each and every other allegation of Paragraph III of the petition.

IV. This defendant admits the allegations of Paragraph IV of the petition that, prior to the year 1893, a corporation known as the Northern Pacific Railroad Company, organized and existing under certain acts and resolutions of Congress, and which then operated some parts of the lines of this defendant, became insolvent and was placed in the hands of receivers appointed by various courts of the United States; that, while in this condition, a plan of reorganization was entered into by the bondholders of said company, and that an arrangement was proposed between the said bondholders and the Great Northern Company which was never carried out. This defendant admits that a case entitled Pearsall against the Great Northern Railway Company was decided by the Supreme Court of the United States on March 30, 1896, and is reported in volume 161 of the reports of said court, beginning on page 696.

This defendant denies any knowledge or information sufficient to form a belief of each and every other allegation of Paragraph IV of the petition. It is informed and believed

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that said paragraph is wholly irrelevant to the cause of action, if any, stated in the petition.

V. This defendant admits the allegations in Paragraph V of the petition that early in the year 1901 this defendant and the Great Northern Company, acting for the purpose of promoting their several interests, each purchased shares of stock of the Chicago, Burlington and Quincy Railroad Company of Illinois, paying therefor with the joint bonds of the Great Northern Company and the Northern Pacific Company, payable in twenty years from date, with interest at 4 per cent per annum, at the rate of \$200 in bonds for each \$100 in stock, and in this manner the said companies severally purchased and acquired each about 49 per cent of said stock; that the lines operated by said [244] Burlington Company and its connections were geographically as stated in the petition, and that some of said lines compete with some lines of what is called in the petition the Union Pacific system.

This purchase was made by these defendants primarily in order to secure a terminus in Chicago and permanent connection with the eastern and southeastern markets, which are especially valuable to the agricultural and mineral products of the northwest, and also because the Burlington system serves a large and growing territory, and the purchase was deemed desirable and profitable in itself. It had no connection with the future formation of any company whatsoever and was not made with intent to violate the statute or common law of any State or of the United States, and was not in violation of any such law.

This defendant denies each and every other allegation of Paragraph V of the petition. It is informed and believes that said paragraph is wholly irrelevant to the cause of action, if any, stated in the petition.

VI. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of Paragraph VI of the petition.

VII. This defendant admits the allegation of Paragraph VII of the petition, that the defendant Northern Securities Company was heretofore organized, as it is informed and believes, under the general laws of the State of New Jersey.

This defendant denies any knowledge or information suffi-

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cient to form a belief of each and every other allegation of Paragraph VII of the petition.

VIII. This defendant admits the allegations of Paragraph VIII of the petition that the defendant, Northern Securities Company, has purchased and now holds and owns a large majority of the capital stock of this defendant, and that the Securities Company has received such dividends as have been paid on any shares held by it.

This defendant denies any knowledge or information sufficient [245] to form a belief of each and every other allegation of Paragraph VIII of the petition.

IX. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of Paragraph IX of the petition.

X. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of Paragraph X of the petition.

XI. This defendant denies each and every allegation of Paragraph XI of the petition.

XII. This defendant denies each and every allegation of Paragraph XII of the petition. It is informed and believes that said paragraph consists merely of expressions of opinion, and is, therefore, without weight in support of any cause of action.

XIII. This defendant denies any knowledge or information sufficient to form a belief of each and every allegation of Paragraph XIII of the petition.

XIV. As this defendant is informed and believes, the purchase by the Northern Securities Company of shares of stock of this defendant and the sale thereof by the owners have been expressly authorized by law. They have had no effect whatever, in law or in fact, in restraint or monopoly of trade or commerce among the several States or with foreign nations. The petition does not allege that at any place within the jurisdiction of this court or elsewhere any such restraint or monopoly has been effected.

If these lawful transactions, consisting merely of the purchase and sale of property, should hereafter have any effect in restraint or monopoly of trade or commerce among the several States or with foreign nations, that would not be their

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direct effect, but would be merely indirect, remote, incidental, and collateral, and would, therefore, not bring said transactions within said act of Congress above mentioned. Any other construction would render the statute unconstitutional, as beyond the power of Congress, and as depriving the sellers of the stock thus sold and also the stockholders of this defendant who have not sold [246] their shares to the Securities Company, of liberty and property without due process of law, because, thus construed, it would be an inhibition upon their right to sell their property. If complainant's contention be sustained, the right of the owner of property to sell the same will be dependent upon what the courts at any future time may hold to have been the intention of the purchaser in buying such property. This result would seriously impair the liberty of the owner and the value of his property, and is contrary to the constitutional guaranties thereof.

These transactions are, therefore, not within the act of Congress above mentioned; nor has Congress any constitutional power to annul or prohibit action thus expressly authorized by state statutes under which the same has been or may hereafter be taken.

XV. There is a defect of necessary parties defendant herein, because in this suit it is sought to annul all sales of shares made by shareholders of this defendant to the Northern Securities Company and to cancel all certificates of stock of the latter company issued in purchase of the same. The parties making such sales are numerous, and many of them had no connection with the matter save to sell their shares to the Securities Company after its organization. It is obvious that in their absence no adjudication can be made annulling such sales to the Securities Company. A decree to such effect as prayed for by the petition necessarily would deprive such original sellers of their property without due process of law. All persons who sold shares in this defendant to the Securities Company are, therefore, necessary parties, and the petition is bad by reason of their absence.

XVI. And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or

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necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and [247] avoided or denied, the same is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

The first five paragraphs of the answer of the defendants, J. Pierpont Morgan and Robert Bacon, were substantially the same as the same paragraphs of the answer of the Northern Pacific Railway and the remainder of the answer of such defendants was as follows:

VI. These defendants admit that the defendant James J. Hill and certain other persons decided upon the formation of a securities company for the purposes set forth in the certificate of incorporation of the Northern Securities Company attached to the petition and in all respects as therein stated.

These defendants deny each and every other allegation of Paragraph VI of the petition.

VII. These defendants admit the allegations of Paragraph VII of the petition that on November 13, 1901, the defendant Northern Securities Company was organized under the general laws of the State of New Jersey, with its principal office in Hoboken, in said State, and with an authorized capital stock of \$400,000,000, and that a copy of the articles of incorporation of said company correctly stating its powers is attached to the petition.

These defendants deny each and every other allegation of Paragraph VII of the petition.

VIII. These defendants admit the allegations of Paragraph VIII of the petition that on or about November 14, 1901, the defendant Northern Securities Company was organized by the election of directors and officers; that the defendant James J. Hill was chosen a director and president thereof; that thereupon the said James J. Hill and other stockholders of the Great Northern Company, each individu-

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ally and separately [248] from the others, sold to the Securities Company a large amount of the capital stock of the Great Northern Company for the price of \$180 par value of the capital stock of the Securities Company for each share of the capital stock of the Great Northern Company; that these defendants and other stockholders of the Northern Pacific Company, each individually and separately from the others, sold to the Securities Company a large amount of the capital stock of the Northern Pacific Company; that the Securities Company also offered, for a limited period, like terms of purchase to the other shareholders of the Great Northern Company; that the Securities Company now holds and owns a large majority of the capital stock of the Northern Pacific Railway Company, and a large amount, though less than a controlling interest, of the stock of the Great Northern Company, and has negotiated for the purchase of additional shares of that company, and that the Securities Company has received such dividends as have been paid on any shares held by it.

These defendants deny each and every other allegation of Paragraph VIII of the petition.

IX. These defendants deny each and every allegation of Paragraph IX of the petition.

X. These defendants deny any knowledge or information sufficient to form a belief of each and every allegation of Paragraph X of the petition.

XI. These defendants deny each and every allegation of Paragraph XI of the petition.

XII. These defendants deny each and every allegation of Paragraph XII of the petition. They are informed and believe that said paragraph consists merely of expressions of opinion, and is, therefore, without weight in support of any cause of action.

XIII. These defendants deny each and every allegation of Paragraph XIII of the petition.

XIV. In July, 1896, the capital stock of the Northern Pacific Railway Company was fixed at \$155,000,000, of which [249] \$75,000,000 were preferred and \$80,000,000 common stock. The preferred stock of the company was issued in exchange for various obligations of the former Northern

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Pacific Railroad Company because the holders thereof would not accept new common stock therefor. At the same time it was contemplated that the time would arrive when said preferred stock should properly be retired, and it was, accordingly, then provided that the preferred stock might be retired in whole or in part at par on any first day of January, up to and including January 1, 1917. Both classes of stock were made subject to a voting trust in this defendant Morgan and others, continuing until November 1, 1901, but terminable by the trustees in their discretion at an earlier date.

The Northern Pacific Company shared in the recent prosperity of the country, and its common stock appreciated in value until it was deemed practicable to carry out the original intention of retiring the preferred stock and also to terminate the voting trust. Accordingly said trust was terminated by the trustees upon January 1, 1901, and the preferred stock was retired. Although the latter action was in contemplation and was practically decided upon some time before the termination of the voting trust, it was not made the subject of formal action by the board of directors until November 13, 1901, and was completed upon January 1, 1902.

XV. As hereinbefore stated, early in 1901, the Northern Pacific Company, and the Great Northern Company, each purchased about 49 per cent of the capital stock of the Chicago, Burlington and Quincy Railroad Company. This purchase was made by the Northern Pacific Company primarily in order to secure a terminus at Chicago and permanent connection with the eastern and southeastern markets, which are especially valuable for the agricultural and mineral products of the northwest, but also because the Burlington system serves a large and growing territory, and the purchase was deemed desirable and profitable in itself.

These purchases were not made, as the petition alleges, "in [250] contemplation of the ultimate placing of the Great Northern and Northern Pacific system under a common source of control." They had no connection whatever with the future formation of the Northern Securities Company, or any other company whatsoever, and had no connection with the fact alleged in the petition that the Union Pacific Rail-

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way system is to some extent a competing system with the Burlington system.

The said purchases were not made with intent to violate the statute or common law of any State or of the United States; were not in violation of any such law, and are not charged in the petition to have been in any respect unlawful.

XVI. During the reorganization of the Northern Pacific system the firm of J. P. Morgan & Co., of which these defendants are members, acted as reorganization managers, and ever since the reorganization of the Northern Pacific Company has been its fiscal agent. Said firm has accordingly at all times desired to further the best interests of the company and all its stockholders, and especially to aid in steadily developing the business of the company and the prosperity of the country which it serves. Said firm considered that these results were accomplished, so far as possible, by the policy of the company during the existence of the voting trust, as above stated. Not long after the termination of the voting trust, however, and very early in May, 1901, said firm became aware that unusually large purchases of both classes of stock were in progress in the stock market, apparently in a single interest. Said firm was apprehensive that these purchases were for the purpose of securing control of the direction of the Northern Pacific Company and thus managing it, not for what said firm conceived to be the best interest of the company, but for some ulterior purpose of which said firm was not informed.

Accordingly said firm, prior to May 7, 1901, purchased common stock of the Northern Pacific Company in considerable amounts, and their holdings upon that day amounted to about two hundred thousand shares. In making these purchases said [251] firm acted on its own account and in behalf of no other person whomsoever, and was actuated by no motive save those above stated.

The said purchases were not made with intent to violate the statute or common law of any State or of the United States, and were not in violation of any such law.

XVII. For some years the defendant Hill and others who were interested in the Great Northern Company, but not including these defendants, had in contemplation the formation of a corporation for the purpose of purchasing their separate

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interests in that company, with the general object that said interests should be held together and the policy and course of business of the Great Northern Company should be continuous in developing the company's system and the territory served by it, and not subject to radical change and possible inconsistency from time to time. In or about August, 1901, as this plan was approaching maturity, said parties for similar reasons determined that they would also sell to the new company, when formed, their interests in the Northern Pacific Company, which were considerable in amount, and that the capital of the new company should be made sufficiently large to enable it to purchase all shares of the Great Northern and Northern Pacific companies which the holders might desire to sell and any other shares which the new company might deem it advisable to acquire.

By this time it had become known that the purchases in the market of shares of the Northern Pacific Company, to which reference is made above, had been made in behalf of a corporation known as the Oregon Short Line Railroad Company, controlled by the Union Pacific Railroad Company; that there were held in that interest shares of the Northern Pacific Company to about the amount of \$41,000,000 of preferred stock, which, however, was to be retired on January 1, 1902, and \$37,000,000 of common stock, together making 780,000 shares and constituting an absolute majority of the total capital stock of the Northern Pacific Company. Thereupon and therefore, [252] with the view and for the purpose of protecting the Northern Pacific Company and the holders of its common stock against the possible control of the direction of said company in an adverse interest, these defendants determined and also advised their friends to sell their Northern Pacific stock to the new company.

As set forth in the petition, the Northern Securities Company was duly organized pursuant to the laws of New Jersey upon November 13, 1901. It was organized according to law, and possesses all the powers set forth in its certificate of incorporation, and has full power to do every act which it has in fact done, and the petition does not allege the contrary.

It having become known that the Oregon Short Line Company was not disinclined upon satisfactory terms to sell its

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holdings of the major part of the Northern Pacific stock, the firm of J. P. Morgan & Company, deeming such action for the best interest of the Northern Pacific Company, purchased from said Oregon Short Line Company all its holdings of the capital stock of the Northern Pacific Company.

After its organization the Northern Securities Company duly purchased all the shares of the Northern Pacific Company and of the Great Northern Company hereinbefore mentioned, including those purchased by the firm of J. P. Morgan & Company from the Oregon Short Line Company, for which it paid partly in cash and partly in its own shares. It also was willing to purchase the shares of any other shareholders of the Great Northern Company, who desired to sell the same, for the price of one hundred and eighty dollars for each share of the Great Northern Company, payable in its own shares, and did actually purchase and pay for considerable amounts of said stock at such price.

None of these purchases by the Northern Securities Company were made with intent to violate the statute or common law of any State or of the United States, or were in violation of any such law.

XVIII. The foregoing is a correct statement of all the matters mentioned in the petition, omitting its many irrelevant adjectives, adverbs, and conclusions, and of some other facts in addition thereto. The transactions prior to the formation of the Northern Securities Company had no connection whatever with the formation thereof, save as above stated. That company was organized, not for the purpose of acquiring a majority of the stock of either the Great Northern or the Northern Pacific Company, but as above set forth. It was not organized for the purpose of affecting railway rates or competition in the slightest degree, and has not had any such effect. In the transactions above stated these defendants and, so far as they are aware, the other parties who have been engaged therein have never sought or intended to violate the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, c. 647), or to enter into any contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the sev-

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eral States or with foreign nations, or to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States or with foreign nations.

The transactions have consisted merely in the organization of a lawful corporation of New Jersey and the sale to and purchase by it of property lawfully salable. All acts done in relation to the organization of the Securities Company and the purchase by it of shares of stock of the railway companies and the sale thereof by the owners have been expressly authorized by law. They have had no effect whatever, in law or in fact, in restraint or monopoly of trade or commerce among the several States or with foreign nations. The petition does not allege that at any place within the jurisdiction of this court or elsewhere any such restraint or monopoly has been effected.

If these lawful transactions, consisting merely of the purchase and sale of property, should hereafter have any effect in restraint or monopoly of trade or commerce among the several States or with foreign nations, such effect would not be their [254] direct effect, but would be merely indirect, remote, incidental, and collateral, and aside from any intention of the parties, and therefore would not bring said transactions within said act of Congress. Any other construction would render the statute unconstitutional as beyond the power of Congress, and as depriving these defendants and the sellers generally of the stock thus sold, of liberty and property without due process of law, because, thus construed, it would be an inhibition upon their right to sell their property. If complainant's contention be sustained, the right of the owner of property to sell the same will be dependent upon what the courts at any future time may hold to have been the intention of the purchaser in buying such property. Such a result would seriously impair the liberty of the owner and the value of his property, and is contrary to the constitutional guaranties thereof.

These transactions are, therefore, not within the act of Congress above mentioned; nor has Congress any constitutional power to annul or prohibit action thus expressly authorized by state statutes under which the same has been taken.

Decree of the Circuit Court.

XIX. There is a defect of necessary parties defendant herein because in this suit it is sought to annul all sales of shares made by shareholders of the Great Northern Company and the Northern Pacific Company to the Northern Securities Company, and to cancel all certificates of stock of the latter company issued in purchase of the same. As already set forth, the parties making such sales are numerous, and many of them had no connection with the matter save to sell their shares in the railway companies to the Securities Company after its organization. It is obvious that in their absence no adjudication can be made annulling such sales to the Securities Company. A decree to such effect as prayed for by the petition necessarily would deprive such original sellers of their property without due process of law. All persons who sold shares in the railway companies to the Securities Company are, therefore, necessary parties, and the petition is bad by reason of their absence.

XX. And these defendants deny all and all manner of [255] unlawful combination and confederacy wherewith they are by the said petition charged, without this, that if there is any other matter, cause, or thing in the petition contained material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or denied, the same is not true to the knowledge or belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

The answer of the defendant Daniel S. Lamont was substantially the same as that of defendants Morgan and Bacon except that certain allegations as to the actions of J. P. Morgan & Co. in Paragraphs XVI and XVII were omitted.

On April 9, 1903, after the case had been tried before a Circuit Court consisting of Circuit Judges Caldwell, Sanborn, Thayer and Vandevanter (for opinion of Judge Thayer, see 120 Fed. Rep. 720), the following decree was entered:

"Ordered, adjudged and decreed as follows, to wit:

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among

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the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' denounces as illegal.

"That all the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be owned and held by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States.

"That the Northern Securities Company, its officers, agents, servants and employes be and they are hereby enjoined from [256] acquiring, or attempting to acquire further stock of either the aforesaid railway companies.

"That the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein.

"That the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies.

"And that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold:

"And that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, The Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting [257] the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies.

"It is further ordered and adjudged that the United States recover from the defendants its costs herein expended, the same to be taxed by the clerk of this court, and have execution therefor."

Mr. George B. Young for appellants argued and presented in a brief the following summary of the facts:

1. For some years prior to 1901 the two railway com-

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panies had been engaged in an enterprise of building up a great interstate and Oriental commerce.

2. In April, 1901, they purchased nearly all the Burlington shares at a cost of over \$200,000,000, paying for them with their joint bonds, and not with the bonds of the Burlington as stated in the decision of the lower court. They made the purchase not with any view of placing the two companies, their shares or their commerce, under a single control.

3. Immediately after this purchase, persons interested in the Union Pacific attempted to obtain the stock control of the Northern Pacific, their object being to prevent the carrying out of the enterprise of the defendant railway companies, and especially to prevent the use of the Burlington road in carrying out that enterprise.

4. This "raid" (as it is called) on the Northern Pacific stock failed, the failure being largely due to an error of the raiders in buying common instead of preferred stock. But there was imminent danger that another like attempt might be made and be successful.

5. Such a raid, if successful, would destroy the commerce the railway companies were building up, and in aid of which they had bought the Burlington shares.

[258] 6. For some years prior to 1901, Mr. Hill and ten other shareholders in the Great Northern Co., holding less than 30 per cent of its stock had contemplated the formation of a company to which they should make absolute transfers of their shares in consideration of the shares of such new company. Their purpose was that the shares should be voted alike in the future as they had been in the past, and that they should fare alike in any sale of them that might be made.

7. In June, 1901, after the defeat of the raid, it was first suggested that the proposed company should be enlarged so as to include the Northern Pacific common stock (about \$21,000,000) held by the same persons, and later the plan was still further widened so as to include the Northern Pacific common stock (about \$20,000,000) held by J. P. Morgan & Co. should they desire to make such disposition of the stock held by them.

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8. It had all along been the purpose of Mr. Hill and his ten associates that every shareholder in the Great Northern Co. should be given an opportunity to join the company as originally planned,—this not because they needed or desired the accession of such other shareholders, but to avoid any complaint of unfair treatment on their part.

9. This purpose was carried into the enlarged project, and at the instance of Mr. Morgan, the same opportunity was to be given to holders of Northern Pacific stock. And like the company originally projected, the enlarged company was to be authorized and was expected to acquire shares in coal mines and in industrial enterprises of utility to the railways, but whose stock the railway companies could not hold, and also to be a financial as well as an investment company, with power in that capacity to aid the operations of the railway companies, or of any other companies whose shares or securities it might hold.

10. The amount of Great Northern stock held by Mr. Hill and his ten associates was from 33 to 35 millions out of a total capital of \$125,000,000. In 1896, they had severally [259] acquired \$29,000,000 of Northern Pacific common stock, which amount had, on May 1, 1901, been reduced by sales to \$20,000,000.

11. In forming the Northern Securities Co. it was the intention of its promoters that it should acquire, if it could, a majority of Northern Pacific stock, thereby protecting such stock from future raids, and protecting the commerce of the railways from the ruin that would result from a successful raid.

They did not desire or expect that the Securities Co. should acquire a majority of Great Northern shares. Such acquisition was not deemed necessary for the protection of the stock of that company or of the commerce of the roads.

12. While the capitalization of the Securities Co. is nearly, it is not (as stated in the opinion) the *exact* amount required to pay for all the shares of the two railway companies at the prices (\$180 for Great Northern and \$115 for Northern Pacific) fixed for such exchanges.

13. Mr. Hill and his ten associates who promoted the Securities Co. did not agree or bind themselves even to trans-

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fer their own shares to the Securities Co. Each of them was left to decide for himself. Mr. Hill retained between two and three millions of his shares.

And neither they, nor any one concerned in promoting the Securities Co., nor J. P. Morgan & Co. ever agreed in any manner that upon the organization of the Securities Co. they would "use their influence to induce other stockholders in their respective companies to do likewise," as erroneously stated in the decision of the lower court.

14. The Securities Co. is not a railway company and has no power to build or operate railways. Its powers are limited to buying, selling and holding stocks, bonds and other securities, with power to aid in any manner any company whose stock or bonds it may hold, and to do all acts designed to aid any company whose shares or securities it may hold, and protect or enhance the value of its investment; also to hold any real or personal property required for the transaction of its business. [260] In short, it is at once an investment and a financial company.

15. Soon after its organization, and on November 18, 1901, the Securities Co. purchased the Northern Pacific shares that had been acquired by those concerned in the raid, known as the Harriman shares. Those had been purchased from them by J. P. Morgan & Co. The purchase comprised \$37,023,000 of common stock and \$41,085,000 of preferred stock, at a lump price of \$91,407,500, payable (and paid) \$8,915,629 in cash, and \$82,491,871 in shares of the Securities Co. at par. About the same time it received from its promoters and J. P. Morgan & Co., the Northern Pacific common stock (about \$42,000,000) held by them. It availed itself of its right as a common stockholder of the Northern Pacific to purchase at par for cash, the new common stock (issued to replace the \$75,000,000 preferred stock retired) to the amount of 75-80 of the amount of common stock held by it. As a result of these purchases, the Securities Co., at the beginning of the year 1902, and before this suit was begun (in March, 1902) held about \$152,000,000 of the total \$155,000,000 stock of the Northern Pacific.

16. Soon after its organization, Mr. Hill and the other promoters of the Securities Co. transferred to it about 30

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millions of Great Northern shares at \$180 in exchange for Securities shares at par, and within three months from its organization, (and before the commencement of this suit,) the Securities Co. had acquired, on the same terms and from other holders, about 65 millions of Great Northern shares, making its total holdings 95 millions of the total capital of 125 millions.

17. It is not the fact, as stated in the decision that the Securities Co. was enabled to make the purchase of 65 millions of stock bought from non-promoters, or of any of it, by the advice, procurement or persuasion of the Great Northern shareholders who had been instrumental in organizing the Securities Co. There is not any evidence in support of this finding, and the evidence is conclusive against it.

The facts proved beyond question are that each purchase [261] was an independent transaction between the seller of stock, and the Securities Co., without solicitation, persuasion or other influence by the Securities Co., or any one else.

18. At the time of the formation of the Securities Co., the Great Northern shareholders were 1,800 in number. Of them about 1,200 transferred their shares to the Securities Co.

When this suit was begun, in April, 1902, the shareholders of the Securities Co. were more than 1,300; in October, 1902, they were about 1,800.

19. The Securities Co. is the absolute owner of the shares acquired by it and of the dividends thereon. The shares are not pooled or consolidated, nor are the earnings of the two roads pooled. It is in no sense a "trust."

20. The promoters of the Securities Co.—Mr. Hill and his ten associates—do not, all of them together hold, nor have they ever held more than one-third of the \$360,000,000 stock of the Securities Co. that has been issued and is outstanding, and these gentlemen and J. P. Morgan & Co. have never held more than \$140,000,000.

21. By the charter of each railway company, its commerce is controlled and directed wholly by a board of directors, the members of which are chosen for prescribed terms and cannot be removed during their terms. And by the laws of Minnesota and Wisconsin no person who is a director in one company can be a director in the other.

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22. The Securities Co. has not attempted to control or meddle with the commerce or the management of either railway, nor is there any evidence that it purposes doing either. Ever since its formation such commerce has been conducted by the two boards of directors in complete independence of each other.

23. There has been no agreement to suppress and no suppression of competition between the two railway companies, which is as active as it was before the Securities Co. was formed.

24. The entire interstate commerce of the two railways, the rates on which can be controlled by those companies without other competition or consent of connecting lines, falls short [262] of three per cent of their total interstate commerce; and any restraint that could be in any event imposed by the Securities Co. on their interstate commerce could only affect this three per cent.

All the interstate commerce of each railroad (including the competitive three per cent) has been largely increased since the organization of the Securities Co., owing to the great advantages of the Burlington connection, and to the protection afforded to all the commerce of the roads by placing a majority of Northern Pacific shares beyond the reach of raids, in the ownership of the Securities Co. And during such period rates have been reduced to such an extent as to reduce net earnings by upwards of \$1,000,000.

25. There has been no increase of capitalization of either railway company, nor any watering of that of the railway companies or of the Northern Securities Co. The capital of each railway remains unchanged. If the Securities Co. had issued its shares at par for cash, and used the money to buy the railway shares for cash in the market at their market value, its outstanding shares would be more than at present. It would have had to issue and sell at least 190 of its shares, to be able to buy for cash each 100 shares of Great Northern which it has obtained by exchange of only 180 of its own shares. And it would have had to pay more than \$115 for Northern Pacific. The course pursued, instead of watering in any way the Securities Co.'s stock, has furnished that company with properties of a market and intrinsic value consid-

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erably in excess of the par value of the shares issued by it in payment for them.

Appellants contend as to the Anti-Trust Act and its meaning:

1. The act is wholly a criminal law, directed to the punishment and prevention of crime. The remedy by injunction, etc., given by the fourth section is not to protect property interests, but solely to prevent "violations of this Act" (i. e. crimes, for every violation of the act is a crime, and, without this section, would not be within the competence of a court of equity to restrain by injunction).

[263] 2. Being a criminal statute, the act is not to be enlarged by construction. The first section cannot be stretched so as to make criminal (and whatever the section declares unlawful, it makes criminal, and makes nothing criminal it has not declared unlawful) every agreement, combination or conspiracy that merely tends to restrain commerce among the States, or that confers on the parties to it or any one else the power to restrain trade.

3. The act makes unlawful and criminal every contract, combination or conspiracy in direct restraint of interstate trade or commerce.

The gist of the crime is the contract, combination or conspiracy, and the offense is complete on the making of such contract, or the formation of such combination or conspiracy, though nothing be done to carry it out, and though trade be not in fact restrained.

But to constitute a combination or conspiracy in restraint of interstate trade or commerce, the parties must combine or conspire to do acts, which, if performed, will of themselves restrain such trade or commerce, and will directly restrain it—that is, acts which operate directly on such commerce.

If the acts which the parties combine or conspire to do fall short of this, if they are not such as operate directly on the commerce, and by such operation directly restrain it, then the combination or conspiracy is not within the act.

4. The act makes criminal those contracts, combinations and conspiracies only which directly and immediately restrain interstate trade or commerce—that is by acting directly

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and immediately upon such trade or commerce. 171 U. S. 568, 592; 175 U. S. 234, 245.

5. As the crime consists in contracting, combining or conspiring to do acts which by their own operation will directly and immediately restrain interstate commerce, it necessarily follows that if the acts which the parties contract or combine to do are of that description, they violate the law, though they had no conscious purpose or "specific intent" to restrain interstate [264] commerce by the means of such acts or at all. 156 U. S. 341.

On the other hand, if the acts to be done are not such as by their own operation on interstate commerce directly restrain it, the contract, combination or conspiracy to do those acts is not a crime under the Anti-Trust Act. 175 U. S. 234.

6. The act makes criminal every contract, etc., in direct restraint of commerce, without respect of persons.

A contract or combination or conspiracy that would be criminal as in restraint of interstate commerce or trade if made between two or more railway companies, is equally a crime if made between two or more interstate carriers by wagon or stagecoach or ferry, or between two or more interstate traders wholesale or retail. 166 U. S. 312.

7. Any restraint of interstate commerce, or power to restrain it, directly consequent upon the acquisition of property and incident to its ownership, is not, nor is the agreement for such acquisition made criminal by, this act. 156 U. S. 16.

Hence, where competitors in interstate trade or commerce agree to and do form a partnership or a corporation, or where one of them buys out the other, or a third person or association of persons buys out both, whatever suppression of competition or power to suppress competition may follow is not, nor is the agreement to form such corporation, partnership or association for such purchase, made criminal by the act. 171 U. S. 505, 567.

8. So where a combination is formed to acquire, and which does acquire, nearly all of an article in common use throughout the country and shipped in large quantities among the States, such ownership, though it gives the power to control the interstate trade and commerce in such article, and to suppress such trade and commerce altogether, is not, nor is such

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combination, a restraint of commerce prohibited by the Anti-Trust Act, the power being an incident of ownership. 156 U. S. 1, 16.

9. By this act Congress regulates commerce by punishing [265] the making of certain contracts by fine and imprisonment. The regulation is and must be uniform throughout the United States, for an act made criminal when done in Minnesota cannot be innocent when done in Massachusetts. The matters embraced in the act, thus requiring a uniform regulation throughout the country, are matters within the *exclusive* jurisdiction of Congress, and no matters that are not within such exclusive jurisdiction are within the act. If it appears that the States have jurisdiction of any matter (e. g., the ownership of stock in or the consolidation of railway companies doing an interstate business) claimed to be within this act, the existence of jurisdiction in the States is conclusive that such matter is not within the act.

The appellants, therefore, maintain the following propositions:

1. The Government is not entitled to maintain this proceeding under sections 1 and 4 of the Anti-Trust Act, nor had the Circuit Court jurisdiction of it under those sections, for the conspiracy or combination charged in the petition and found by the Circuit Court, if it ever existed, had done all it was formed to do, and had come to an end, before the proceeding was instituted..

2. The only combination of which there is any evidence is a combination formed in aid of commerce, to liberate, protect and enlarge and not to restrain it, and which has liberated, protected, aided and enlarged it, and has not restrained and does not threaten to restrain it.

3. There is no evidence of the combination or conspiracy charged in the petition, or of the combination or conspiracy found by the Circuit Court.

4. The conspiracy or combination in question whether as alleged in the petition or as found by the Circuit Court, was not a combination or conspiracy in restraint of interstate commerce, for the only things which the parties thereto combined or conspired to do or procure to be done were (1) the

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organization of the Securities Co., and (2) the acquisition by the Se- [266] curities Co., with their help, of a large majority of the shares of each of the defendant railway companies in exchange for its own shares.

The things so to be done or procured to be done (whether taken separately or together) are such as do not and cannot in any wise restrain interstate commerce, and hence a combination or conspiracy to do them or procure them to be done is not in restraint of interstate commerce.

The Circuit Court erred in holding (1) that the Securities Co., having acquired such majority of shares, has power to suppress competition between the railway companies. In fact, the Securities Co. is without power to suppress competition. It is a mere shareholder and not a director. The office of director is created by the State and not by the shareholder. As to power of directors being distinct from those of shareholders, see *Hoyt v. Thompson*, 19 N. Y. 207, 216; *Burrill v. Nahant Bank*, 2 Metc. 163; *Pullman Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587. The charter of each railway company gives to the board of directors all the powers attributed to it in the foregoing decisions. Rev. Stat. Wisconsin, 1878, c. 87, § 1804; Gen. Stat. Minnesota, 1894, § 2717; (2) that it obtained and holds such power by means of and as a party to the combination or conspiracy and not as an incident of its ownership of the shares; (3) that the possession of such power to suppress competition is of itself, and irrespective of its exercise, a restraint of interstate commerce; and therefore (4) the combination or conspiracy in question was in restraint of such commerce.

5. The petition does not allege nor do the proofs disclose any facts showing a monopoly or a conspiracy or attempt to monopolize any interstate or foreign commerce. For definition of monopoly, see *Texas Pacific v. Interstate Com. Co.*, 162 U. S. 197, 210; *United States v. Freight Association*, 166 U. S. 290; *Pearsall v. Great Northern*, 161 U. S. 646, 676; *United States v. E. C. Knight Co.*, 156 U. S. 1, 10; *In re Corning*, 51 Fed. Rep. 205, 211.

[267] 6. The case is not within the Anti-Trust Act, for in any view of the matters complained of, their effect upon commerce—whether much or little, for good or for ill—is

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indirect and remote. The Anti-Trust Act and the regulative power of Congress under the commerce clause of the Constitution, are alike strictly limited to matters which directly and immediately affect interstate or foreign commerce.

In determining what is a combination in direct restraint of commerce the distinction between direct and indirect regulations of commerce becomes important, see *Fargo v. Michigan*, 121 U. S. 230; *Phila. S. S. Co. v. Pennsylvania*, 122 U. S. 326, 328; *N. Y., L. Erie &c. R. Co. v. Pennsylvania*, 158 U. S. 431; *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217; *Pickard v. Pullman Co.*, 117 U. S. 34; *Pullman Co. v. Pennsylvania*, 141 U. S. 18, 25. In the declarations of the limitations of the act and of the power of Congress, the court has merely repeated its settled doctrine. *Hooper v. California*, 155 U. S. 648, 655; *Williams v. Fears*, 179 U. S. 270, 278.

Where subjects for commercial regulation are of a nature to require or admit of one uniform system or plan of regulation, the power to regulate them is exclusively in Congress, and any attempted regulation by a State whether to enlarge or restrain, is simply *ultra vires*, for it is a usurpation of a power vested exclusively in Congress. *Wabash Railway Co. v. Illinois*, 118 U. S. 557, 574; *Robbins v. Shelby Taxing District*, 120 U. S. 489, 492; *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326, 336; *Bowman v. Chicago, etc., R. R. Co.*, 125 U. S. 465, 480. Anything, therefore, not exclusively within the jurisdiction of Congress is not within the act.

7. The very general language of the Anti-Trust Act was not intended to include combinations to purchase railways or railway shares, competing or non-competing, nor consolidations actual or "virtual" of railways or railway companies. Congress, when passing the act did so with full knowledge of the situation. *Ches. & O. Tel. Co. v. Manning*, 186 U. S. 238, 245. It knew that the railway systems of the country [268] rested on such combinations authorized by state laws, some of them having existed many years.

These are matters of public history and within the knowledge of the court. *Ohio L. & T. Co. v. Debold*, 16 How. 416, 435; *R. R. Co. v. Maryland*, 21 Wall. 456, 469; *Brown v.*

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Piper, 91 U. S. 37, 42; *Phillips v. Detroit*, 111 U. S. 604, 606; *Lehigh Valley v. Pennsylvania*, 145 U. S. 192, 201; *Louisville & Nashville v. Kentucky*, 161 U. S. 677, 699; *Preston v. Browder*, 1 Wheat. 115, 121; *United States v. Union Pacific*, 91 U. S. 72, 79; *Platt v. Union Pacific*, 99 U. S. 48, 55.

If Congress had meant to declare such consolidations and stock purchases of competing companies to be illegal, the securities issued by them void and state legislation unconstitutional, it would have said so in plain, specific and apt language.

The construction put on the act by all branches of the government and by everybody down to the commencement of this proceeding, has been in full accord with our position that the act has nothing to do with combinations to own railways or railway shares. The following consolidations of competing railroad lines existed at the time of the passage of the act or have been effected since that time: Boston & Maine Railroad Company and competing lines; New York, New Haven & Hartford Railroad Co., and New England Railroad Co. and other roads; New York Central Railroad and the West Shore and Rome, Watertown and Ogdensburg and other railroad companies; Pennsylvania Railroad Company and Baltimore and Ohio and other companies; the Reading Company.

8. Even though the Government were entitled to any injunction, the decree goes far beyond what the Government was entitled to receive, or the Circuit Court authorized to grant.

Mr. John G. Johnson, for appellant, Northern Securities Company, argued:

The facts found by the court below cannot be deduced from the testimony and the substratum of the bill filed, of the ar- [269] guments below in its support, and of the decision of the lower court was the assertion of a conspiracy which never existed. It is conceded that the Securities Company did acquire a majority of stock of both railroad companies and such acquisition was because of its intent to acquire. The company is chargeable with all the legal consequences of an intentional acquisition of such shares. It is

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denied, however, that any individuals or corporations conspired to do anything except to form a corporation and acquire shares of the Northern Pacific Railway Company belonging to them, and about twenty-seven per cent of the stock of the Great Northern Railway Company. The subsequent acquisition of an additional fifty per cent of the Great Northern stock was for third persons over whom the defendants had no control but who simply accepted an invitation to sell their stock issued by the Securities Company after its formation. The authorized capital of that company was made sufficiently large to enable it to acquire all the stock of both roads but this was not in pursuance of any combination, conspiracy or contract but of the policy of the appellants to let every co-shareholder of the railroad companies have the benefit of every advantage obtained for themselves.

Everything of which the Government complains was done with the intention of working out with permanent results the problem of interstate and international commerce. In order to effect permanent arrangements and to promote a great public end through a greatly increased commerce, at low rates, the two railway companies purchased the shares of the Burlington road for over \$200,000,000, paid by their joint and several bonds, thus being able to give assurances of permanency of low rates and do such other things as were necessary in building up and enlarging this great commerce. This resulted in demands by the Union Pacific for a part of the traffic and on their being refused the Oregon Short Line acting for the Union Pacific acquired a large amount, almost a controlling interest, in the stock of the Northern Pacific. The situation was critical and the organization of the Securities Com- [270] pany and all that followed was for the purpose of preventing a raid on the stock similar to that which had so nearly succeeded and was done solely with the attempt to secure the maintenance of the benefit to commerce, which had resulted, and which, still more in the future, would result from the acquisition of the Burlington shares.

Such alliances as that of the Burlington with the Northern Pacific and Great Northern are valuable because they give an opportunity of securing a large number of markets in a great

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and rich territory under a fairly permanent transportation policy. They are of enormous value to the people along the lines of the railroads, to the country generally and to the world. To transact business, large investments must be made and the condition prerequisite thereto is reasonable assurance of continuance. When the Government seeks to condemn an arrangement which promotes the interest of the whole nation by pretending that it was intended to restrain trade, it must establish convincingly the existence of the illegal intent alleged.

The sole question of law to be determined is whether or not the acquisition by a corporation of a controlling interest in the shares of two competitive railway companies, violates the Sherman Act. It is not illegal for an existing corporation to acquire such controlling interest; it is not illegal for persons holding a sufficient number of shares to enter into an agreement that will form a company to acquire such control. An agreement to do what is legal cannot be an illegal conspiracy, combination or contract.

The Sherman Act is a penal one, defining a criminal offense, for which it provides a punishment. It is an indispensable prerequisite to a conviction for a criminal misdemeanor, especially if there be no criminal intent, and such does not exist in the present case, that the offense condemned shall be clearly defined, and it is well settled that penal laws are to be strictly construed. *United States v. Willberger*, 5 Wheat. 76; *United States v. Whittier*, 5 Dillon, 35, citing *United States v. Morris*, 14 Pet. 464; *United States v. Sheldon*, 2 Wheat. 119; *United [271] States v. Clayton*, 2 Dillon, 219; Bishop on Statutory Crimes, sec. 41; *Andrews v. United States*, 2 Story, 213; *United States v. Hartwell*, 6 Wall. 385, 396; *Swearingen v. United States*, 161 U. S. 446, 451; *France v. United States*, 164 U. S. 676, 682; *Schooner Paulina's Cargo v. United States*, 7 Cr. 52, 61; *United States v. Reese*, 92 U. S. 214, 219; *United States v. Comerford*, 25 Fed. Rep. 902; *United States v. Chase*, 135 U. S. 255, 261; *United States v. Goldenberg*, 168 U. S. 95, 102; *Sarlls v. United States*, 152 U. S. 570, 575.

This court will not legislate but will merely discharge its

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duty of construction. If the legislation is incomplete a crime cannot be fastened upon one who has done innocently something not defined as criminal. An act not made criminal cannot be condemned because it may seem equally, or even more, evil than the one made criminal. That Congress had no clearly defined understanding of the nature of the misdemeanor at which it struck, is evidenced by the final debates in the House of Representatives.

The purchase by a person or corporation, of a majority of the shares of two competing railway companies, is not "a contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." The Sherman Act prohibits, not a contract *tending* to restrain trade, but one actually in restraint thereof. The meaning of "restraint of trade" was well understood when the Sherman Act was passed. *United States v. Freight Association*, 166 U. S. 290, 328. In the *Addyston Case*, 175 U. S. 211, the contract was actually in restraint of trade.

The holding by a person or corporation as owner of a majority of the shares of two competing railway companies, is not "a contract or combination or conspiracy in restraint of trade" within the meaning of the act.

A corporation, though incorporated for the purpose of holding, and actually holding, a majority of the shares of two competing railway companies is not such a combination or conspiracy. See the *Pearsall Case*, 161 U. S. 646; *United States [272] v. Joint Traffic Association*, 171 U. S. 505, 567. A person or corporation, by purchasing a majority of the shares of two competing railway companies does not monopolize, or attempt to monopolize, "any part of the trade or commerce among the several States." As to what a monopoly is, see *In re Green*, 52 Fed. Rep. 104; dissenting opinion of Story, J., in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 606; 20 Am. & Eng. Ency. of Law, 846; 2 Rawle's Bouvier's Dictionary, 435, and cases cited; Blackstone, Bk. IV, 159; Century Dictionary.

The purchase by one person, of the property of his rival, with the intention thereby to destroy his competition, is not illegal, although by the purchase he will acquire the power to

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prevent the same. *Oregon Coal Co. v. Winsor*, 20 Wall. 64. A person or corporation, by holding, as owner, the majority of the shares of two competing railway companies, does not monopolize, or attempt to monopolize "any part of the trade or commerce among the several States."

The power of Congress to regulate commerce does not confer upon it a right to prescribe the persons who may engage therein, or to regulate, or to control, the ownership of shares of stock of corporations engaging therein. *United States v. Knight*, 156 U. S. 1; *Louisville & Nashville v. Kentucky*, 161 U. S. 677, 693.

The States create railroad corporations and may prescribe the manner of issuance of their shares, and the method of transfer of title thereto. In the use and operation of railroads engaged in interstate commerce, the corporations owning the same must submit to Federal jurisdiction but this does not involve any right on the part of the United States to control the transfer of shares by the shareholders, even though as a result of said transfers the controlling interest may be transferred. It is not within the power of the Federal government to destroy the title to property created by the State.

Congress has unrestricted power to prevent restraint or monopolization of interstate commerce, as the authorities de- [273] fine those words, but not as the United States now claims. Properly interpreted, the Sherman Act is constitutional but the United States is now endeavoring to have its provisions interpreted so as to be violative of States' rights. Such a construction should not be adopted, if there is one which harmonizes with the Constitution. *Grenada County v. Brogden*, 112 U. S. 261; *Hawaii v. Mankichi*, 190 U. S. 197.

The mere ownership of property cannot be an illegal restraint of trade. As to the power of the State over railroad corporations, see *Railroad Co. v. Maryland*, 21 Wall. 456; *Ashley v. Ryan*, 153 U. S. 436.

The relief decreed by the lower court was improper under any aspect of the case. *United States v. Knight*, 156 U. S. 1, 17.

Argument of Mr. Bunn for Northern Pacific Railway.

Mr. Charles W. Bunn for appellant, Northern Pacific Railway Company, argued:

The Sherman Act only declares those contracts illegal which are in restraint of trade. The government cannot rest on proof of combination and conspiracy but must establish restraint of commerce and to do this must prove that the ownership by one person of the stocks of two competing roads is *per se* such restraint.

The statute must be interpreted so as to fall within the constitutional powers of Congress which do not extend to determine the ownership of stock in corporations or to the regulation of consolidations of railroad companies chartered by the States.

This power belongs to the States; Congress only has the power to regulate the use of such property in commerce between the States. See definition of commerce in *Gibbons v. Ogden*, 9 Wheat. 1, 189, 196, as repeated by this court in *Passenger Cases*, 7 How. 283, 394, 462; *Henderson v. Mayor*, 92 U. S. 259, 270; *Lottery Case*, 188 U. S. 321, 346. Congress has power only under § 8, Art. I, of the Constitution, and by Amendment X all power not thus granted is reserved to the States. Under the guise of regulating commerce Congress [274] cannot prescribe general rules as to transfer of real or personal property or prohibit the purchase of stock and bonds because when bought they may be used in a business carried on with intent to monopolize or restrict interstate commerce. *In re Greene*, 52 Fed. Rep. 104, 113, citing *County of Mobile v. Kimball*, 102 U. S. 691, 702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203; *United States v. E. C. Knight Co.*, 156 U. S. 1. The power of Congress extends only to those things that directly and immediately pertain to commerce; the powers of the States include many things which operate indirectly though importantly on commerce. *Gibbons v. Ogden*, 9 Wheat. 1, 203. For cases involving this demarkation between national and state powers, see *United States v. Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe Co. v. United States*, 175 U. S. 211, 228; *Hopkins v. United States*, 171 U. S. 578, 592; *Anderson v. United States*, 171 U. S. 604, 615; *Sherlock v. Alling*, 93 U. S. 99; *Louisville & Nashville v. Kentucky*, 161 U. S. 677, 701. In the

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last case this court cites decisions in which state statutes prohibiting or permitting consolidation were enforced. This would have been erroneous if the things complained of fell within the power of Congress, for that power if it exists is exclusive of all state action, and must be so in order that it be uniform. As to matters in regard to which the States may act until Congress acts, see *Cooley v. Board of Port Wardens*, 12 How. 299; *The James Gray v. The John Fraser*, 21 How. 184; *Pound v. Turck*, 95 U. S. 459; *Robbins v. Shelby Taxing District*, 120 U. S. 489, 492; and cases cited *supra*. No rule of law is introduced by the Sherman Act; what was restraint of commerce is the same now; the only feature of the act is making the preliminary conspiracy a crime. The Constitution itself forbade restraint of interstate commerce. *In re Debs*, 158 U. S. 564. A combination that is restraint of trade now was restraint of trade before the act of leasing, buying and consolidation of competing railroads has gone on for fifty years both before and since the act of 1890.

[275] If a thing restrains interstate commerce it is immaterial how innocent the intent may be, and if it does not restrain it, it is immaterial how evil the intent may be. The question is does the agreement restrain trade or commerce. *United States v. Freight Association*, 166 U. S. 290, 341; *Addyston Case*, *supra*. If an action be lawful its purpose is immaterial. This is elementary. *Phelps v. Nowlen*, 72 N. Y. 39, 45; *Kiff v. Youmans*, 86 N. Y. 324, 329; *Wood v. Amory*, 105 N. Y. 278, 281; *Lough v. Outerbridge*, 143 N. Y. 271, 282; *Adler v. Fenton*, 24 How. 407, 410; *United States v. Greenhut*, 51 Fed. Rep. 205, 211; *In re Greene*, 52 Fed. Rep. 104, 111; *Randall v. Hazleton*, 12 Allen, 412, 418; *Brackett v. Griswold*, 112 N. Y. 454; *United States v. Isham*, 17 Wall. 496; *Dickerman v. Northern Trust Co.*, 176 U. S. 181; *Fahrney v. Kelly*, 102 Fed. Rep. 403; *Mogul S. S. Co. v. McGregor*, App. Cas. (1892) 25, 41; *Allen v. Flood*, L. R. App. Cas. (1898) 1; *Bohn Mfg. Co. v. Hollis*, 54 Minnesota, 223, 234. The opinion of the court below proceeds upon the proposition that a combination of two competitors is a restraint of trade because it lessens competition. This is error. The *Trans-Missouri*, *Joint Traffic* and *Addyston* cases prove

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only that a contract restraining rival companies from competing is a restraint of trade. No such agreement exists in this case. The law does not require competition. The business of a rival may be purchased for the purpose of being rid of his competition. *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 104; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618, 621; *Trenton Potteries Co. v. Olyphant*, 56 N. J. Eq. 680; *Oakdale Co. v. Garst*, 18 R. I. 484.

The Securities Company is neither alleged nor proved to have done or omitted anything which can be construed as a violation of the Anti-Trust Act. If it has the power to suppress or diminish competition it has not used it and if the act has been violated at all it must be due to the mere existence of the Securities Company, to its powers as applicable to railway com- [276] panies or to something illegal in its origin. The illegality can not be sustained under the decisions of this court.

Mr. John W. Griggs for appellant, Northern Securities Company, submitted a brief:

The acts of the defendants do not constitute a contract, combination, or conspiracy in restraint of interstate trade or commerce within the meaning and prohibition of the Sherman Act. The United States rests its case upon two allegations:

First. That the Northern Securities Company has been formed and has taken over a majority of the shares of the two railroad companies in the manner indicated by the pleadings and proofs.

Second. That the intended and the necessary effect of those acts is to destroy competition between the two railroad companies.

The answer of the defendants is:

First. That the formation of the Northern Securities Company and the acquirement by it of stock of the two railroad companies was a lawful transaction, governed solely by local state laws, and not in contravention of any provision of the Federal Constitution or statutes.

Second. That the acts of the defendants were all done in

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good faith, without any purpose to destroy competition or restrain trade.

To put it more concisely: The defendants contend that what they have done is lawful, has no direct effect in restraint of competition, and was not intended to restrain competition.

The creation of railway corporations; the form of their corporate organization; the character and qualities of their corporate stock; the routes which their roads shall take, whether they may connect with other roads running in the same general direction, whether they may or may not consolidate with parallel lines, or operate parallel lines through different portions of a State—all these matters are, and always have been, subjects of state jurisdiction. *Louisville & Nashville R. Co. v. [277] Kentucky*, 161 U. S. 677, 702; *Pearsall v. Great Northern*, 161 U. S. 646; *Lake Shore & Mich. Southern v. Ohio*, 173 U. S. 285; *Missouri, Kansas & Texas v. Haber*, 169 U. S. 613; *Cleveland &c. Railway v. Illinois*, 177 U. S. 514.

The lower court did not find as matter of fact that the defendants had in any way restrained trade or commerce; or that they had attempted so to do; or that they had contracted or combined so to do. What the court did find and decide was, that the defendants had done certain things whereby they had obtained the power to suppress competition between two interstate carriers who own and operate competing and parallel lines of railroad. This idea is repeated again and again throughout the opinion. It speaks of "a direct restraint of interstate commerce because it would have placed in the hands of a small coterie of men the power to suppress competition between two competing interstate carriers."

To say that one person, or several persons, cannot acquire or own a majority of the stock of two competing railroad corporations because they are thereby occupying a vantage ground from which they can, if they choose, effect an agreement or understanding between the two companies in restraint of competition, is to say that the power to commit a crime is equivalent to its actual commission.

The acts of the defendants being *prima facie* lawful, the burden of proof is upon the Government to show that they

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were, as the Attorney General charges, not *bona fide*, but a mere formal device intended to defeat the provisions of the Sherman Act. *Joint Traffic, Trans-Missouri, Addyston Pipe Cases; United States v. Hopkins*, 171 U. S. 578; *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994; *State v. Shippers Compress & Warehouse Co.*, 67 S. W. Rep. (Texas) 1049; *S. C.*, affirmed, 69 S. W. Rep. 58.

Any restraint of trade or commerce which may result from the acts done by the defendants is indirect and incidental only, and not covered by the act. In every instance where this court has had occasion to pass upon the meaning of the act [278] it has carefully distinguished between acts which directly restrain commerce, and acts which only indirectly or incidentally have that effect. *United States v. E. C. Knight Co.*, 156 U. S. 1, 12, 16; *Joint Traffic Case*, 171 U. S. 505, 566; *United States v. Ches. & Ohio Fuel Co.*, 105 Fed. Rep. 93; *S. C.*, affirmed, 115 Fed. Rep. 610.

If the Sherman Act can be so construed as to forbid the sale of stock in two competing railroad corporations to one purchaser, then that act is an attempted interference on the part of Congress with transactions which are wholly within the control of the States of the Union, and in that respect the act is unconstitutional.

As to the extent of state legislative power over the instrumentalities of interstate commerce, see *Louisville & Nashville Case*, 161 U. S. 677, 702; *C. & C. Bridge Co. v. Kentucky*, 154 U. S. 204. Regulation of commerce, to be constitutional, must be confined to commerce itself, and cannot reach out to those things which not being designed as agencies of such commerce, or not being actually enjoined therein, may yet have an indirect or ultimate relation thereto.

Such a construction of the Constitution would vest in Congress the regulation of all branches of productive business from their first beginnings. *License Tax Cases*, 5 Wall. 462.

The fact that an article was manufactured for export to another State does not make it an article of interstate commerce. *Coe v. Errol*, 116 U. S. 517; *Kidd v. Pearson*, 128 U. S. 1.

The creation of state corporations and the regulation of the sales of corporation shares belong to the class of business

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affairs over which the States have exclusive jurisdiction. *United States v. Boyer*, 82 Fed. Rep. 425; *Clark v. Central R. R. & Banking Co. of Georgia*, Jackson, J., June 30, 1893, U. S. Circuit Court, Savannah; *In re Greene*, 52 Fed. Rep. 104, 112; *Pearsall v. Great Northern*, 161 U. S. 646, 671; *Rogers v. Nashville &c. Ry. Co.*, 92 Fed. Rep. 312.

But assuming that Congress may, under the commerce clause of the Constitution and as a regulation of commerce, restrain [279] the States in the exercise of their prerogatives from permitting two or more corporations to which the States have given life from merging, yet such a purpose on the part of the Government ought to be clearly and distinctly expressed, and not be found in the judicial interpretation of doubtful language contained in a penal statute.

So that, if it be argued that Congress may forbid the sale of one railroad to another, it is enough to reply that it has never done so; that the Sherman Act does not expressly, or by any just interpretation, do so.

The Sherman Act is a penal statute; every act which may be prevented by injunctive order would, if committed and proven, subject the parties to criminal prosecution. The rule of strict construction must be therefore applied. *United States v. Whittier*, 5 Dillon, 35; *United States v. Sheldon*, 2 Wheat. 119; *United States v. Hartwell*, 6 Wall. 385; *United States v. Shackford*, 5 Mason, 445; *United States v. Clayton*, 2 Dillon, 219; *United States v. Garretson*, 42 Fed. Rep. 22; *Dwarris' Stat.* 641; *Hubbard v. Johnstone*, 3 Taunt. 177.

Acquiescence by the Government for more than eleven years in the actual merger and consolidation of many important parallel and competing lines of railroads and steamships engaged in interstate and international commerce, has given a practical construction to the act of July 2, 1890, to the effect that it was not intended to forbid, and does not forbid, the natural processes of unification which are brought about under modern methods of lease, consolidation, merger, community of interest, or ownership of stock. As held in 1803, in *Stuart v. Laird*, 1 Cranch, 299, where the right of a justice of the Supreme Court to sit as a Circuit Judge was challenged, upon the ground that, not having been appointed as such, and not having been distinctly commissioned as such,

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the act of Congress of 1789, under which the Circuit Court was originally instituted, was unconstitutional.

"Practice and acquiescence for a period of several years, commencing with the organization of the judicial system, [280] affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not to be disturbed."

This is a just principle of jurisprudence, founded upon the very highest considerations of public equity.

It has frequently been invoked and enforced in order to prevent the disturbance and unsettlement of important affairs which have been transacted in reliance upon a general public and private belief that the law did not include them in its terms of condemnation.

But we venture the assertion that no case has ever arisen in which a disregard of that salutary rule of construction would result in such widespread and irremediable injury to vested interests as this. Not that any decree which this court could make against these defendants would particularly or radically affect their property interests, but because the decision once made that the Sherman Act applies to such transactions as the purchase, lease, merger or consolidation of parallel lines of transportation, would render every such transaction for the last thirteen years unlawful, and require the Attorney General, in the due discharge of his duty, to bring suit for dissolution and injunction. Unnumbered millions of dollars of capital stock and bonds issued upon railroad mergers and consolidations would be tainted with illegality, or affected in value by the withdrawal of the property against which they were issued. Purchases of stock in underlying roads long ago made and paid for would be unsettled, and financial chaos would result.

Mr. M. D. Grover for appellant, Great Northern Railway Company, submitted a brief:

The findings of fact upon which the decree rests are contrary to the evidence. This is made clear by separating the findings and considering the evidence bearing on each

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[281] separately. There was no desire or intent to evade the Anti-Trust Act, to restrain competition, to monopolize trade, to inflate securities, water stock, or create fictitious capital.

I. It is not denied that the Northern Securities Company is a corporation lawfully organized under the laws of the State of New Jersey, with charter power to purchase and sell securities of all kinds, and to purchase, hold, vote and sell all the shares of stock of any single corporation or of non-competing corporations. Its right to purchase, hold, vote and sell all the stock of the Great Northern Railway Company alone, or the Northern Pacific Railway Company alone, is not denied.

II. The organization of the Company was the result of a plan to form an investment or holding company, which had its inception years before its articles were filed, among not exceeding ten large holders of Great Northern stock, who had taken an active interest in the policy of the company and its administration, but who never had held in the aggregate to exceed one-fourth of its outstanding stock. It was thought that if a company were formed to which they might sell their individual holdings, their shares would be likely to be held together, so long as a majority of the holding company should wish, and that this would tend to give stability to the policy of the company, be of aid to it in its financial operations, and maintain the value of its investments.

III. The Burlington purchase was made to enlarge trade, not to restrain it; to increase competition, not to suppress it. At the time of the purchase it was not contemplated by either purchasing company or its shareholders that any alliance between the purchasing company or its shareholders was needed to preserve to each company its fair share of the advantages secured by the purchase.

IV. At the time of the organization of the Securities Company the Great Northern shareholders referred to owned about \$30,000,000 of Great Northern stock, and \$35,000,000 [282] of Northern Pacific common stock, having increased their holdings of the latter by purchases from J. P. Morgan & Co. They did not control a majority of the shares of either of the defendant railway companies. In view of the

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injury apprehended to both companies, and their shareholders, and the better to protect their interests in the future, against raids of adverse interests, the Great Northern shareholders referred to deemed it advisable that the holding company which they had considered should be organized, should have power to purchase, not only their own Great Northern and Northern Pacific shares, but also the shares of such other Great Northern and Northern Pacific shareholders as might wish to sell their stock to it, and also the shares of companies already formed, and others that might be formed, for the purpose of aiding the traffic operations of the Great Northern and Northern Pacific companies.

V. At this time it was not expected by any of the persons concerned, that any Northern Pacific shares, except the \$42,000,000 owned by them and by J. P. Morgan & Co. would be acquired by the proposed holding company. The organization of the company was not dependent on any agreement that it should acquire, nor upon the question of, a majority of the shares of either of the defendant railway companies. There was no agreement or understanding between the Great Northern shareholders referred to, that they or either of them would undertake to influence any one of the other 1,800 Great Northern shareholders, or of the other 3,600 Northern Pacific shareholders, to sell their shares to the company.

VI. The Great Northern shareholders referred to, upon the organization of the Northern Securities Company and the sale of their shares to it, parted with such stock control as they had in the Great Northern and Northern Pacific companies. They do not own to exceed one-third of the outstanding capital stock of the Securities Company. At the time of the trial the stock of the Securities Company was held by 1,800 [283] separate owners. The stock control of the Securities Company is, therefore, not in the eight or ten Great Northern shareholders referred to, but in the 1,790 other shareholders of the Securities Company, owning at least two-thirds of its outstanding shares.

VII. Nothing has been done except the purchase by the

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Securities Company of a majority of the stock of the Great Northern and Northern Pacific companies.

VIII. The Securities Company as owner of the stock so purchased may sell it or pledge it. It has made no agreement as to what it will do with it, or how it will vote it, or how it will dispose of the dividends received upon it. It is not a trustee of those from whom it received such shares, and owes them no duty or obligation respecting the shares, since they have no further interest in them.

IX. It is not claimed or pretended that the defendant railway companies have entered into any contract or combination in restraint of trade, or that either of them has done anything to restrain trade or in violation of law. It is not claimed that the Securities Company can restrain trade, except through the exercise of its right, as owner of the shares it purchased, to vote them at stockholders' meetings, in the election of a separate board of directors for each of the defendant railway companies; for the boards must be separate under the laws of the States of Minnesota and Wisconsin.

X. This suit was not brought to prevent or restrain the execution of a contract, or the forming of a combination, in restraint of trade, but to restrain the Securities Company from voting the stock it owns at stockholders' meetings, and from receiving dividends thereon, thereby preventing payment of dividends upon its own shares issued in payment for the shares it purchased, upon the ground that mere possession of the voting power of the shares, is an unlawful restraint and regulation of the interstate commerce of the defendant railway companies.

XI. The Government has no financial interest in this suit. [284] The only way in which the Securities Company could restrain the commerce of the two railway companies, is through the voting power of the shares it owns. If it had purchased the shares of only one of the companies, its right to vote such shares would not be questioned. Trade could not, within the contention of the Government, or the ruling of the court, be restrained by the Securities Company, should its voting powers be limited to the shares of one of the companies. The decree enjoins it from voting the shares of either company and from receiving dividends from either.

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The effect of the decree is to deprive it of the means to pay dividends upon its own stock whether issued in payment for the stock it purchased, or issued for cash. Thus the decree destroys the earning power of the stock of the Securities Company, a large majority of which is now held by over eighteen hundred *bona fide* holders in the usual course of business not parties to the suit.

The important questions are: 1. Does the commerce clause of the Constitution of the United States confer upon Congress jurisdiction to regulate the issue, sale and ownership of the capital stock of corporations organized under the laws of any one of the several States, or to inquire into the motives of incorporators, or of the buyers or sellers of their shares?

2. Has Congress, under the commerce clause of the Constitution of the United States, power to forbid or regulate the purchase or lease, by one railway company engaged in interstate commerce, of the railway of its competitor, or the purchase or lease by the owner of one ferryboat, stage coach or river steamboat, engaged in interstate trade, of the ferryboat, stage coach or river steamboat, of a competitor, on the ground that through such purchase or lease competition may be restrained, and commerce regulated?

3. Is the unity of ownership through purchase, partnership, consolidation or lease, of a majority of the shares of competing corporations, engaged in interstate trade, a contract or combination in the form of trust or otherwise, forbidden by the Anti-Trust Act, as in restraint of trade?

[285] 4. Is there anything in connection with the organization of the Northern Securities Company, or its purchasers of stock, that in any way distinguishes its right to vote and receive dividends upon such stock from the right of any single interest, individual or corporate, to vote and receive dividends upon shares of competing corporations engaged in interstate trade, purchased in the ordinary course of business, or acquired by gift or inheritance?

5. This suit was brought under section 4 of the Anti-Trust Act, which gives the court jurisdiction to prevent and restrain violations of the act. Every violation of the act is criminal. The court is, therefore, given jurisdiction to prevent and restrain the commission of a crime. Months before

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the suit was begun, the Securities Company had acquired a large majority of the shares of the defendant railway companies, from time to time, from hundreds of individual shareholders, who sold their holdings in good faith, and much of the stock so taken in payment therefor has since been sold and exchanged, and passed through many hands, in the usual course of business. Does the Anti-Trust Act give the court jurisdiction to annul the purchases made by the Northern Securities Company, and compel a return of the shares it purchased? Payment for the shares it bought was made in its own stock in part only. It paid cash to the amount of over \$40,000,000. The owners of such shares are changing from day to day; they are not before the court. The decree does not restrain a contract or combination in restraint of trade. It destroys or impairs the value of millions of dollars worth of property, owned by many hundreds of people who acquired their title in good faith and who are not parties to this suit. *First.* The commerce clause of the Constitution of the United States does not take away from the several States the right to authorize the formation of corporations, define their business, fix the amount of their capital or purchasing power, and regulate the issue, sale and ownership of their capital stock.

As respects the purchase by one corporation of the shares [286] of another, the matter rests with the States which have created the corporations. Should unification of ownership of property in corporations proceed to such an extent as to be thought against public policy, it may be prevented by the several States, through limiting the power of corporations, and restraining their right to engage in business.

It has been the practice, since the infancy of railroads in this country, for one railroad company to purchase or lease the railroad of a competing company, or to acquire a majority of the shares of a competing company, or of two companies competing with each other, or to effect the consolidation of competing companies. This has been done without objection from any branch of the Federal Government, and has invariably proven beneficial to the railway companies concerned, to their shareholders, and to the public. The extent to which this has been done appears in the record, and is shown by

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extracts from Poor's Manual and from the annual reports made by the Interstate Commerce Commission to Congress, from 1889 to 1900. And see the brief of Judge Young where this subject is discussed at length with proper reference to the record.

Second. Unity of ownership of shares of competing corporations, engaged in interstate trade, does not restrain such trade, and is not forbidden by the Anti-Trust Act, nor is such unity of ownership a regulation of interstate commerce, and thus subject to exclusive Federal jurisdiction under the commerce clause of the Constitution. *Joint Traffic, Trans-Missouri* and *Addyston Pipe Co.* cases.

There is a distinct difference between an agreement between the owners of competing concerns, to divide territory, to restrain output, or to maintain prices, and the unconditional sale of the property or business of one of them to the other, or of the property or business of both to another person. In the former case, the agreement in terms restrains competition in trade operations, between separate owners or establishments, or instrumentalities engaged in such operations. The agree- [287] ment relates to the manner in which competitors shall conduct their business. If one competing concern buys the plant or business of its competitor, competition is not thereby directly restrained. The restraint in such case, if any, is merely an incident to the ownership of property, and the fact that there may be such a restraint does not forbid the acquiring of such ownership. By unity of interest output is not necessarily limited, prices are not necessarily increased. On the contrary, the public may be benefited, prices may be less by reason of greatly increased volume of business and less cost per unit of production.

Third. The Anti-Trust Act is a penal statute and, as construed by the court below, it makes unity of ownership of a majority of the shares of competing corporations engaged in interstate trade, no matter how such ownership is acquired, criminal, because such ownership gives power to commit crime.

It is conceded that such ownership, so far as it may control the policy of the corporations, can be exercised for a lawful

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purpose, for building up trade, increasing competition and reducing prices.

It is not claimed or pretended that in the case under review trade has been restrained, yet the court below held that unity of ownership of a majority of the stock of the defendant railway companies was unlawful, and, therefore, criminal, because such ownership has necessarily caused the doing of something that has not been done; has necessarily restrained trade, though trade has not been restrained.

Stated in another way, the court below decided that ownership by the Securities Company of a majority of stock of the defendant railway companies regulates the commerce of the companies, and though such commerce has in fact been so regulated as to build up trade, increase competition and reduce prices, in law it has necessarily been so regulated as to restrain trade, suppress competition and increase prices because through unity of ownership motive to compete has been destroyed. *Tozer v. United States*, 4 I. C. C. Rep. 246; *R. R. Co. v. Dey*, [288] 2 I. C. C. Rep. 325; *Schooner Paulina's Cargo v. United States*, 7 Cranch, 52, 61; *United States v. Reese*, 92 U. S. 214.

Fourth. Trade has not been restrained through the exercise of the voting power of these stocks. The ruling that trade has been restrained, is contrary to the facts, and charges the individuals engaged in this transaction with a crime, that has not been committed nor intended.

When this suit was begun, the shares of the Northern Securities Company were held by over eighteen hundred separate owners who had purchased them in good faith, in the usual course of business. The shareholders of the defendant railway companies, who were instrumental in organizing the Securities Company, have never owned to exceed one-third of its stock. The control of the Securities Company, so far as stock ownership can control it through the election of a board of directors, is not in the eight Great Northern shareholders who were concerned in the organization of the company, but in the seventeen hundred and ninety shareholders owners of more than two-thirds of its stock. The combination of which the court convicted the eight individual defendants, was not one by which they were to acquire control over the two rail-

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way companies, for themselves, but one through which such control would necessarily be conferred upon the seventeen hundred and ninety other stockholders of the Securities Company.

The ruling of the court that the possession of the voting power of a majority of the shares of the defendant railway companies by the Securities Company, necessarily restrains trade through suppressing competition, finds no support in facts. The boards of directors of both railway companies may be elected by the Securities Company. The executive officers of the two companies will be elected by these boards, and the ruling of the courts rests upon the proposition, that such boards and officers will be influenced, persuaded or coerced in such way, that they will lack their former incentive to compete for traffic, to obtain it from each other, and to underbid each other for the purpose of getting it; that they will enter [289] into contracts or in some way through concert of action, maintain higher rates than ought to be maintained; in other words, that they will charge unreasonable rates, will not provide adequate facilities, nor extend construction of lines.

The Northern Securities Company has no power or motive to restrain trade which any single owner of a majority of the shares of defendant railway companies would not have, and which the individual owners of the shares did not have, by lawful conference and concert of action, before they transferred their shares to it.

The defendant railway companies were hampered and placed at disadvantage with other transcontinental railways, as well as with ocean competitors by the want of sufficient direct connection with traffic centers offering the best markets for the products of the country along their lines, and with places of production and distribution from which their traffic must be supplied. Through the Burlington purchase they acquired permanent access to markets and sources of supply, instead of a temporary one resting upon joint rates subject to change at any time without regard to their interest. Having made the purchase and assumed the resulting joint and several obligations, it became a matter of the highest importance to each company that the burdens should be

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equally borne and the advantages equally shared. Through placing the ownership of a majority of the shares of both companies in the hands of a single owner, the benefits of the Burlington purchase became better assured than would be the case if the shares were held in many hands, and liable at any time to be sold to an interest adverse to the building up of the business of the defendant railway companies and the country which their lines traverse.

It has not been shown that the power of the defendant railway companies to restrain competition can affect more than three or four per cent of their interstate traffic, or that it has affected or can affect construction or extension of their lines, or the amount or quality of their equipment. Through their [290] ownership of Burlington shares, and by reason of the obligation assumed in paying for the shares, they have a common interest in building up the traffic of each in connection with the Burlington Company. This connection became necessary to their prosperity, to the welfare of their patrons, and to the successful meeting of a world-wide competition. What has been done was done, not to restrain competition, but to enlarge it.

The unity of ownership of their shares has not restrained the commerce of either, and the extent to which such unity can restrain it, is as nothing compared with the great increase in volume of interstate and international commerce which was intended, and which will result from the carrying out of the enterprise of the two companies in the purchase of the Burlington stock, and the preservation of the purchase, and its benefits, by placing the stock of the railroad companies where it is less likely to become scattered and to pass under control of adverse interests, than it would be if held by many owners.

Mr. Francis Lynde Stetson and Mr. David Willcox for appellants, Morgan, Bacon and Lamont, submitted a brief:

The transactions alleged are entirely lawful in their character. They consisted merely in the organization of a lawful corporation of New Jersey, and in the sale to, and purchase by, it of property lawfully salable. All the acts were expressly authorized by law. The legal effect of the transaction has been that the owner of stock in one of the railway companies

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has sold the same to the Securities Company, and has received therefor stock of the Securities Company, which company owns the stock not merely of one of the railway companies, but the stock of both. So that each individual who has transferred his property to the Securities Company has obtained therefor something entirely different—namely, an interest in a company holding stock of the other railway company as well. It is manifest that in the fullest possible sense this constituted a sale of the property. *Berger v. U. S. Steel* [291] *Corp.*, 53 Atl. Rep. (N. J.) 68. The title passed for valuable consideration to a purchaser authorized to hold the property. Aside from the corporate form of the transaction, the effect, too, was that each stockholder in one of the railway companies transferred an interest in his holdings to every other such stockholder.

These transactions being lawful are not affected by allegations as to the motive which actuated them. As the means employed were lawful, the only question must be whether the result accomplished was unlawful. *Pettibone v. United States*, 148 U. S. 197, 203; *United States v. Isham*, 17 Wall. 496; *Adler v. Fenton*, 24 How. 407, 410; *Kiff v. Youmans*, 86 N. Y. 324, 329; cited with approval in *Connolly v. Union Sever Pipe Co.*, 184 U. S. 540, 546; *Randall v. Hazleton*, 12 Allen, 412, 418; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 190; *Strait v. National Harrow Co.*, 51 Fed. Rep. 819; *Phelps v. Nowlen*, 72 N. Y. 39, 45; *Wood v. Amory*, 105 N. Y. 278, 281; *Lough v. Outerbridge*, 143 N. Y. 271, 282; *National Assn. v. Cumming*, 170 N. Y. 315, 326, 340; *Mogul Steamship Co. v. McGregor*, App. Cas. 1892, pp. 25, 41, 42; *Allen v. Flood*, L. R. App. Cas. 1898, p. 1; *Pender v. Lushington*, L. R. 6 Ch. Div. 70, 75.

An intent to violate the Anti-Trust Act, and therefore to commit a crime, could not in any case be inferred, but must be actually proved.

No indirect or remote effect of these lawful transactions upon competition between the railway companies could bring them within the Federal Anti-Trust Act.

The mere fact that a contract has the effect of restraining trade or suppressing competition in some degree does not render it injurious to the public welfare and thus bring it

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within the police power. *Oregon Co. v. Winsor*, 20 Wall. 64; *Gibbs v. Gas Co.*, 130 U. S. 396; *Hyer v. Richmond Co.*, 168 U. S. 471, 477, affirming, 80 Fed. Rep. 839; *Continental Ins. Co. v. Board*, 67 Fed. Rep. 310; *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Hodge v. Sloan*, 107 N. Y. 244; *Leslie v. Lorillard*, 110 N. Y. 519; *Tode v. Gross*, 127 N. Y. 480; *Mathews v. Associated Press*, 136 [292] N. Y. 333; *Lough v. Outerbridge*, 143 N. Y. 271, 145 N. Y. 601; *Oakes v. Cattarangus Co.*, 143 N. Y. 430; *Curran v. Galen*, 152 N. Y. 33, 36; *Watertown Co. v. Pool*, 51 Hun, 157, affirmed 127 N. Y. 485; *Central Shade Roller Co. v. Cushman*, 143 Massachusetts, 353.

In *United States v. E. C. Knight Co.*, 156 U. S. 1; *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604. and *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 246, the Anti-Trust Act concerns only those agreements of which the direct and immediate effect is to restrain commerce. The transaction now under review was lawful, and, however considered, was not prohibited by the Anti-Trust Act, because such restraint upon interstate trade or commerce, if any, as it might impose, would be indirect, collateral and remote.

This act is a criminal statute pure and simple and its meaning and effect as now determined must also be its meaning and effect when made the basis of a criminal proceeding. Conversely, the act should not receive such construction only as it would receive upon the trial of those indicted for violating its provision. Criminal intent is essential to constitute a crime, and the testimony bearing thereon is always a question for the jury. *People v. Wiman*, 148 N. Y. 29, 33; *People v. Flack*, 125 N. Y. 324, 334.

Regardless of all other considerations presented on this argument, the judgment under review must be reversed unless it is to be established as matter of law that the mere possession of the power to control all the means of transportation of two competing interstate commerce carriers operates as the effectual exercise of such power and directly affects interstate commerce, notwithstanding the fact that such power has never been exercised by its possessors, and the further fact that it is perfectly practicable for them to exer-

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cise it in a perfectly proper way. Support for the proposition now under review was sought below in the *Pearsall case*, 161 U. S. 646, 674, the *Joint Traffic case*, the *Trans-Missouri case* and the *Addyston [293] Pipe case*. The proposition, however, can be deduced from these cases only by what to us seems violent distortion. As to the case first cited, see *Minnesota v. Northern Securities Co.*, 123 Fed. Rep. 692, 705.

In the other cases and also in cases decided by the Circuit Court and Court of Appeals, the combinations had been formed by corporations or individuals engaged in business independently of one another and they had agreed to regulate their prices or mode of carrying on their business by the rules of the combination. *United States v. Jellico Coal Co.*, 46 Fed. Rep. 432; *United States v. California Coal Dealers Association*, 85 Fed. Rep. 252; *Chesapeake Fuel Co. v. United States*, 115 Fed. Rep. 610; *Gibbs v. McVeeler*, 118 Fed. Rep. 120.

It has been held repeatedly that such restraints as result from the sale or the purchase of property are not within the provisions of anti-trust statutes. Indeed, it is the settled law that the transfer of a business is not illegal because it restrains trade, even by an express covenant. *Oregon Co. v. Winson*, 20 Wall. 64; *Union Co. v. Connolly*, 99 Fed. Rep. 354, aff'd 184 U. S. 540; *Fisheries Co. v. Lennen*, 116 Fed. Rep. 217; *Harrison v. Glucose Co.*, 116 Fed. Rep. 304; *Hodge v. Sloan*, 107 N. Y. 244; *Leslie v. Lorillard*, 110 N. Y. 519; *Tode v. Gross*, 127 N. Y. 480; *Oakes v. Cattaraugus Co.*, 143 N. Y. 430; *Watertown Co. v. Pool*, 51 Hun. 157, approved 127 N. Y. 485; *Wood v. Whitehead Co.*, 165 N. Y. 545; *Walsh v. Dwight*, 40 App. Div. (N. Y.) 513; *Park & Sons Co. v. Druggists' Association*, 54 App. Div. (N. Y.) 223; *S. C.*, 175 N. Y. 1; *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

So, too, it has been ruled precisely that the formation of associations or corporations is not illegal, because the result will be to restrain competition. *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604; *United States Vinegar Co. v. Foehrenbach*, 148 N. Y. 58; *Rafferty v. Buffalo City Gas Co.*, 37 App. Div. (N. Y.) 618; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 104; *In*

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re Greene, 52 Fed. Rep. 104; *United States v. Greenhut*, 51 Fed. Rep. 205; *In re Terrell*, 51 Fed. [294] Rep. 213; *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507; *Mogul S. S. Co. v. McGregor*, App. Cas. (1892) 25; *Lough v. Outerbridge*, 143 N. Y. 283; *State v. Continental Tobacco Co.*, 75 S. W. Rep. (Mo.) 737.

It is very doubtful whether in any case the second section of the act applies to railroads. Prof. Langdell, 16 Harvard Law Review, 545, June, 1903; Mr. Thorndike, Pamphlet, 1903, *The Merger Case*, p. 32.

In the *Joint Traffic* cases the court did not specifically define "monopoly," but said that it had the meaning given to it in the body of the Anti-Trust Act, which was not involved in the *Pearsall* case, and the decision there cannot now be urged upon this court as a limitation upon its freedom of construction of the statute. See *Laredo v. International Bridge Co.*, 66 Fed. Rep. 246.

Obviously, a consolidation of two railroads authorized by the laws of every State which they enter would not be condemned as constituting a monopoly; nor would a purchase of all the stock of one road by a competing road similarly authorized be so condemned; nor would a combination to induce the legislatures of the several States to authorize such a consolidation or such a purchase. It cannot be that, in prohibiting monopolies, the Congress intended to forbid these familiar processes of railroad amalgamation, and if, when authorized by state law, the consummated act is not a monopoly, it would not be such merely because it has not been so authorized.

The construction claimed would make the statute unconstitutional because it would deprive the Securities Company of its property without due process of law. Corporations are entitled to the same constitutional protection of their property rights as natural persons. *Minneapolis Railway Co. v. Beckwith*, 129 U. S. 26; *Carrington Turnpike Co. v. Sanford* 164 U. S. 578, 592; *Gulf Co. v. Ellis*, 165 U. S. 150, 154; *Lake Shore Co. v. Smith*, 173 U. S. 684, 690; *County of Santa Clara v. Southern Pacific R. R. Co.*, 18 Fed. Rep. 385, 404; *County [295] of San Mateo v. Southern Pacific R. R. Co.*, 13 Fed. Rep. 722, 745, 760.

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This constitutional provision protects the right to acquire property—equally with the right—to hold the same after it has been acquired. *Holden v. Hardy*, 169 U. S. 366, 391; *State v. Goodwill*, 33 W. Va. 179; *State v. Julow*, 129 Missouri, 163, 173; *Knight Case*, 156 U. S. 1.

The *Pearsall Case*, 161 U. S. 646, distinctly recognizes that a natural person would be entirely at liberty to buy all the shares which his means permitted of the stock of the Northern Pacific Railway Company and the Great Northern Railway Company. The State creating a corporation might limit its power in this respect, but Congress had no such general authority to cut down the powers granted by the States to their corporations, merely because they are artificial instead of natural persons. Therefore, it is obvious that a corporation having authority by its charter to make such purchases cannot, merely because it is a corporation, be prevented from so doing without depriving it of that right without due process of law.

As construed and applied by the Circuit Court the Anti-Trust Act is unconstitutional, in that it discriminates between persons in the matter of property rights and privileges on grounds that are purely arbitrary and are without justification in reason.

The power to suppress competition between two competing interstate railroad companies being always existent and under the theory of the Circuit Court always attaching to a majority of the shares of both, whether owned by one person or by several, the Anti-Trust Act, if understood as intended to do away with such power, should be enforced so as to prevent any one person, as much as any two or more persons, from acquiring stock in both of such competing companies.

If as construed by the court below, the Anti-Trust Act arbitrarily and without reason discriminates between persons in the matter of their property, rights and privileges, the act [296] is beyond the power of Congress as clearly as it would be beyond the power of any state legislature.

"Liberty," as used in the Fifth Amendment to the Constitution means not merely bodily liberty—freedom from physical duress, but in effect comprehends substantially all those personal and civil rights of the citizen which it is meant to

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place beyond the power of the general government to destroy or impair. *Slaughter House Cases*, 16 Wall. 36, 122, 127; *Munn v. Illinois*, 94 U. S. 113, 142; *People v. Walsh*, 117 N. Y. 60; *Butchers' Union Co. v. Crescent Co.* 111 U. S. 746; *Allgeyer v. Louisiana*, 165 U. S. 578; *United States v. Joint Traffic Association*, 171 U. S. 505, 572; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 228; *Bertholf v. O'Reilly*, 74 N. Y. 509; *In re Jacobs*, 98 N. Y. 98; *People v. Gillson*, 109 N. Y. 389; *People v. King*, 110 N. Y. 418; *God-charles v. Wigeman*, 113 Pa. St. 431. And see *Regina v. Druitt*, 10 Cox C. C. 592, 600.

It follows that, as used in the Fifth Constitutional Amendment, "liberty" includes equality of rights under the law and secures citizens similarly situated against discriminations between them which are arbitrary and without foundation in reason. *United States v. Cruikshank*, 92 U. S. 542, 554; *Yick Wo v. Hopkins*, 118 U. S. 356, 369; *Gulf, Colorado & Santa Fé Ry. Co. v. Ellis*, 165 U. S. 150, 160.

Hence, the principles affirmed and acted upon by this court in applying the Fourteenth Amendment to state legislation, are equally applicable to legislation by Congress, and, as construed by the court below, the Anti-Trust Act is invalid as trespassing upon the "liberty" of citizens, by denying them equality of rights and discriminating between them in the matter of their property rights, arbitrarily and without reason. *Cotting v. Kansas City Stock Yards*, 183 U. S. 106; *Connolly v. Union Sewer Co.*, 184 U. S. 540; *Barbier v. Connolly*, 113 U. S. 27, 31.

As construed and applied by the Circuit Court, the statute is unconstitutional because without due process of law, it [297] would deprive these defendants and all others who sold to the Securities Company of their property. If there were any prohibitions on the companies it would not apply to their stockholders. A corporation and its stockholders are different entities. *Pullman Co. v. Missouri Pacific*, 115 U. S. 587; *Watson v. Bonfils*, 116 Fed. Rep. 157; *American Preserves Co. v. Norris*, 43 Fed. Rep. 711; *Electric Co. v. Jamaica Co.* 61 Fed. Rep. 655, 678.

Any effort to limit the right to sell necessarily would deprive these defendants of their property without due process

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of law. *Cleveland Co. v. Backus*, 154 U. S. 439, 445; *People ex rel. Manhattan Co. v. Barker*, 146 N. Y. 304, 312; *People ex rel. Manhattan Institution v. Otis*, 90 N. Y. 48, 52; *Holden v. Hardy*, 169 U. S. 366, 391; *People v. Marx*, 99 N. Y. 377, 386; *People v. Gillson*, 109 N. Y. 389; *Forster v. Scott*, 136 N. Y. 577; *Ingersoll v. Nassau Co.*, 157 N. Y. 453, 463; *Purdy v. Erie R. R. Co.*, 162 N. Y. 42, 49; *City v. Collins Baking Co.*, 39 App. Div. (N. Y.) 432; *Rochester Turnpike Co. v. Joel*, 41 App. Div. (N. Y.) 43; *People v. Meyer*, 44 App. Div. (N. Y.) 1; *Ingraham v. National Salt Co.*, 72 App. Div. (N. Y.) 582; *Janesville v. Carpenter*, 77 Wisconsin, 288, 301.

If complainant's contention should be sustained, the right of an owner of property to sell the same would be dependent upon what the courts at any future time might hold to be the intention of the purchaser in buying the property. Such a result would seriously impair the liberty of the owner, and the value of his property.

Whatever view be taken of the character of the transaction the decree of the Circuit Court transcended the authority of the court under the statute, which was the sole ground and source of its jurisdiction.

Mr. Attorney General Knox, with whom *Mr. William A. Day*, Assistant to the Attorney General, was on the brief, for the United States, appellee:

The bill was filed by the United States to restrain a violation [298] of the Anti-Trust Act of July 2, 1890, 26 Stat. 209; the defendant, Northern Securities Company, is a corporation organized under the general laws of New Jersey; the two railway companies are common carriers engaged in freight and passenger traffic among the several States and with foreign nations; the Great Northern was chartered by the State of Minnesota and the Northern Pacific Railway Company operates under a Federal franchise originally granted to the Northern Pacific Railroad Company, and in taking over that franchise it not only became invested with the rights and privileges incident thereto, but also became charged with the duties, obligations and conditions which Congress attached to the granting thereof. The Northern Pacific Railroad Company was the constant concern of Con-

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gress. See Act of July 2, 1864, Res. May 7, 1866, extending time for completion; Act of June 25, 1868, relative to filing reports; Joint Resolution, July 1, 1868, extending time for completion; Joint resolution of March 1, 1869, allowing issue of bonds; Joint Resolution, April 10, 1869, granting right of way; Resolution of May 31, 1870, authorizing issue of bonds; act of September 29, 1890, forfeiting certain granted lands; act of February 26, 1895, providing for classification of mineral lands; act of July 1, 1898, granting lands in lieu of those taken by settlers. -

The individual defendants were, prior to November 13, 1901, large and influential holders of the stock, some of one railway company and some of both companies. The two railroads are practically parallel for their entire length; each system runs east and west through Minnesota, North Dakota, Montana, Idaho and Washington; each connects with steamers on Lake Superior running to Buffalo and other eastern points and at Seattle with lines of the steamships engaged in trade with the Orient. The lower court found that the roads "are, and in public estimation have ever been regarded as, parallel and competing." The testimony in this case establishes that fact which is also *res judicata*, *Pearsall v. Great Northern Railway Co.*, 161 U. S. 646, and even if the roads only competed for [299] three per cent of their interstate business they would be competing lines.

It has been the ever present aim of those dominating the policy of the Great Northern and the Northern Pacific, during the past few years, to bring about a community of interest or some closer form of union to the end that the motive from which competition springs might be extinguished. On at least three prior occasions Mr. Hill and Mr. Morgan and their associates acted in concert in transactions affecting both roads: the attempted transfer of half the stock of the Northern Pacific to the Great Northern in exchange for a guarantee of the bonds of the Northern Pacific which was held to be violative of the laws of Minnesota, *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646; the joint purchase of the Burlington in 1901; in the events leading up to the panic of May, 1901. After the refusal to admit the Union Pacific to an interest in the

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Burlington purchase, those in control of the Union Pacific attempted to acquire control of the Northern Pacific and as soon as Mr. Hill and Mr. Morgan heard of this attempt they reached an understanding to oppose it in concert, and this resulted in the threat to retire the preferred stock of the Northern Pacific, and the subsequent conference at which the plan announced in the statement of June 1, in the Wall Street Summary, was arranged. The testimony of defendants shows that the incorporation of the Securities Company, and its acquisition of a large majority of the stock of both railway companies were the designed results of a plan or understanding between the defendants Hill and Morgan and their associates, which was carried out to the letter by the parties thereto. The facts, as the Government asserts them, are recapitulated in the opinion of the Circuit Court.

On the facts as proved the Government maintains that a combination has been accomplished by means of the Securities Company which is in violation of § 1 of the act of July 2, 1890; that the defendants have monopolized or attempted to monopolize a part of the interstate or foreign commerce of the United [300] States and that if either result has been accomplished, the relief granted by the Circuit Court was authorized by law. The contention as to whether the Anti-Trust Act is or is not a criminal statute is not material. Nor was it in the *Joint Traffic Case*, 171 U. S. 505. The primary aim of Congress in passing the act was not to create new offenses but to pronounce and declare a rule of public policy to cover a field wherein the Federal government has supreme and exclusive jurisdiction. As the United States has no common law, contracts in restraint of trade would not be repugnant to any law or rule of policy of the United States in the absence of a statute, and the controlling purpose of the act was to declare that the public policy of the nation forbade contracts, combinations, conspiracies, and monopolies in restraint of interstate and international trade and commerce, and the jurisdiction conferred upon courts of equity to restrain violations of the act was intended as a means to uphold

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and enforce the principle of public policy therein asserted, not as a means to prevent the commission of crimes. *United States v. Trans-Mo. Freight Assn.*, 166 U. S. 290, 342.

If the Anti-Trust Act is a criminal statute, it is also in the highest degree a remedial statute; as such it is invoked in the case at bar, and as such it ought to be construed liberally and given the widest effect consistent with the language employed. It ought not to be frittered away by the refinements of criticism. Broom's *Legal Maxims*, 5th Am. ed., 3d London ed., 80; Potter's *Dwarris on Stat. and Const.* 231, 234; Pierce and Hopper, *Str.* 253. It makes no difference in the application of these rules that the statutes have a penal as well as a remedial side. *Ch. Prac.* 215.

A statute may be penal in one part and remedial in another part. But in the same act a strict construction may be put on a penal clause and a liberal construction on a remedial clause. Sedgwick on *Construction of Statutory and Constitutional Law*, (2d ed.) 309, 310; Dwarris on *Statutes*, 653, 655; *Hyde v. Cogan*, 2 Doug. 702.

[301] The Anti-Trust Act was purposely framed in broad and general language in order to defeat subterfuges designed to evade it. It is framed in sweeping and comprehensive language which includes every combination, regardless of its form or structure, in restraint of trade or commerce among the several States or with foreign nations, and every person, natural or artificial, monopolizing, attempting to monopolize, or combining with any other person to monopolize any part of such trade or commerce.

The form or framework is immaterial. Congress, no doubt, anticipated that attempts would be made to defeat its will through the "contrivances of powerful and ingenious minds," and to meet these it used the broad and all-embracing language found in the act; and it is in this light that that language is to be construed. And the device of a holding corporation for the purpose of circumventing the law can be no more effectual than any other means. Noyes on *Inter-corporate Relations*, § 393.

This court has decided that this act applies to common carriers by railroad, as well as all other persons, natural or

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artificial. *Trans-Missouri Case*, 166 U. S. 290. The words in restraint of trade as used in the act extend to any and all restraints whether reasonable or unreasonable, partial or total, and there are peculiar reasons why this applies to railroad corporations.

In exercising its powers over commerce Congress may to some extent limit the right of private contract, the right to buy and sell property, without violating the Fifth Amendment. It may declare that no contract, combination, or monopoly which restrains trade or commerce by shutting out the operation of the general law of competition shall be legal. *Trans-Missouri Case*, *supra*; *Joint Traffic Case*, *supra*; *Addyston Pipe Co. Case*, 175 U. S. 211.

When its natural effect is to stifle, smother, destroy, prevent, or shut out competition, the agreement or combination is in restraint of trade or commerce and illegal under section 1 of [302] the act if in interstate or international trade or commerce. *Trans-Missouri Case*, *supra*.

"To prevent or suppress competition" and "to restrain trade" are, in fact, often used by judges as convertible terms to express one and the same thought.

Mogul S. S. Co. v. McGregor, L. R. App. Cas. (1892), 25, was decided upon common law principles, there being no statute, such as the Federal Anti-Trust Act, making it unlawful and criminal to enter into agreements or combinations in restraint of trade.

Both the Court of Appeal and House of Lords held that the action could not be maintained because, even if it were in restraint of trade, an agreement in restraint of trade was not unlawful at common law in the sense that it furnished cause for a civil action by one damaged by it, but only in the sense that it was void and unenforceable if sued on.

The Government does not claim that ordinary corporations and partnerships formed in good faith in ordinary course of business come within the prohibitions of the act because incidentally they may to some extent restrict competition, but those where the corporation or partnership is formed for the purpose of combining competing businesses. The act embraces not only monopolies but attempts to monopolize. The term monopoly as used by modern legislators and judges

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signifies the combining or bringing together in the hands of one person or set of persons the control, or the *power* of control, over a particular business or employment, so that competition therein may be suppressed. *People v. Chicago Gas Trust Company*, 130 Illinois, 294; *People v. North River Sugar Refining Co.*, 54 Hun (N. Y.), 377; *United States v. E. C. Knight Co.*, 156 U. S. 1. And as to railroads, see *Pearsall v. Great Northern Railway*, 161 U. S. 646, 677; *Louisville & Nashville R. R. Co. v. Kentucky*, 161 U. S. 677.

A combination or monopoly exists within the meaning of the act even if the immediate effect of the acts complained of is not to suppress competition or to create a complete monopoly. [303] It is sufficient to show that they *tend* to bring about those results. Cases cited *supra*, and *Salt Co. v. Guthrie*, 35 Ohio St. 672.

It is not essential to show that the person or persons charged with monopolizing or combining have actually raised prices or suppressed competition, or restrained or monopolized trade or commerce in order to bring them within the condemnation of the act. It is enough that the necessary effect of the combination or monopoly is to give them the power to do those things. The decisive question is whether the power exists, not whether it has been exercised. In the *Trans-Missouri, Joint Traffic, Pearsall* and *Addyston Cases*, *supra*, this court held that it was immaterial that trade or commerce had not actually been restrained—that it made no difference, even, that rates and prices had been lowered, it being enough to bring the combination within the condemnation of the act that it had the *power* to restrain trade or commerce. The very existence of the *power*, under these rulings, constitutes a restraint.

It is not necessary in order to bring a combination or conspiracy within the operation of the act that the members *bind* themselves each with the other to do the acts alleged to be in restraint of trade. It is enough that they act together in pursuance of a common object, and while, of course, this presupposes agreement between them in a broad sense, an agreement or contract in the technical sense is not at all essential. *Reg. v. Murphy*, 8 C. & P. 397.

A combination or a monopoly, the necessary effect of which:

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is to restrain trade or commerce, is a violation of the act, and the aim, motive, intention, or design with which the combination is entered into or the monopoly created is wholly immaterial and outside the question. It may have been to aid and further commerce rather than to restrain it; but if in point of law the effect or the tendency of the combination is to restrain trade or commerce the combination is unlawful, and the motive behind it, however beneficent, does not alter that fact in the [304] slightest degree. *Trans-Missouri Case*, 166 U. S. 290, 341; *C. & O. Fuel Co. v. United States*, 115 Fed. Rep. 623.

A combination or monopoly of competing lines of interstate railway—of competing instrumentalities of interstate commerce—is a combination or monopoly in restraint of interstate commerce within the prohibition of the act. The transportation of persons and things is commerce and if a combination or monopoly of such transportation is a combination or monopoly in restraint of commerce within the act, and hence illegal, it follows as a corollary that a combination or monopoly of the means or instrumentalities of transportation is likewise a combination or monopoly in restraint of commerce, because a monopoly of the means of transportation leads directly and inevitably to a monopoly of transportation itself.

Again, a monopoly of the *means* of transportation puts it in the *power* of the monopolist to stifle competition in the *business* of transportation, and a combination or monopoly which had the *power* to stifle competition in the *business* of transportation among the States is in restraint of interstate commerce and therefore illegal.

From still another standpoint. Congress may prohibit, and has prohibited, combinations and monopolies in the *business* of interstate and international transportation. But what does this power amount to if Congress may not also prohibit monopolies of the *means and instrumentalities* of such transportation—of the roads themselves? Virtually nothing; for he who has a monopoly of the means of transportation has a monopoly of transportation itself. See the *Trans-Missouri Case*, *Joint Traffic Case* and *Pearsall Case*, *supra*.

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The Anti-Trust Act prohibiting combinations and monopolies in restraint of interstate and foreign commerce is an exercise of the power granted to Congress to regulate commerce, *Champion v. Ames*, 188 U. S. 321. and the term "commerce" as used in that grant embraces the instrumentalities by which commerce is or may be carried on. *Railroad Co. v. Fuller*, [305] 17 Wall. 560. 568; *Welton v. Missouri*, 91 U. S. 275, 280; *Pensacola Tel. Co. v. West. Un. Tel. Co.*, 96 U. S. 1; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203.

But put the proposition as it is put by appellants: Can Congress regulate the ownership of interstate railroads under its power to regulate commerce among the States, and has it done so by this act of 1890? Most certainly, yes. Congress can regulate anything and everything in the sense that it can prohibit and prevent its use in a way that will defeat a law that Congress may constitutionally enact. For this purpose, the supreme power operates upon everything, upon every one.

No device of State or individual creation can be interposed as a shield between the Federal authority and those who attempt to subvert it. No rules of law which govern the relations which individuals have created *inter sese*, or which have been assumed between themselves and a State, are to be considered in an issue between them and the United States to defeat the ends of a constitutional law. The Federal power would not be supreme if the operation of its laws could be defeated, embarrassed, or impeded by any means whatsoever.

It is no violation of the reserved rights of the States, but, on the contrary, is clearly within the Federal power for Congress to enact that no persons, natural or artificial, shall form a combination of the instrumentalities of any part of interstate commerce the effect or tendency of which would be to restrain interstate trade or commerce, and that no person or persons, natural or artificial, shall acquire a monopoly of such instrumentalities. This is a natural and logical deduction from the supreme, plenary, and exclusive nature of the power of the Federal Government over foreign and interstate commerce, in the exercise of which Congress may descend to the most minute directions.

The "penetrating and all-embracing" nature of this power

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has often been stated, explained, and emphasized by this court. *Gibbons v. Ogden*, 9 Wheat. 1, 197, and see concurring opinion of Johnson, J., also. The principles announced in [306] this case have never been departed from, but have been reaffirmed time and again by this court, notably in *Brown v. Maryland*, 12 Wheat. 419; *Passenger Cases*, 7 How. 283; *In re Debs*, 158 U. S. 564; *Champion v. Ames*, 188 U. S. 321; *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 11, 16.

The fact that in recent years interstate commerce has come to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

Of course, it makes no difference whether the obstruction be physical or economic—whether it be a sand bar, a mob, or a monopoly—whether it result from the sinking of a vessel or the stifling of competition—the power of Congress to remove it is the same in each case. *Gilman v. Philadelphia*, 3 Wall. 713, 724.

On these subjects the state legislatures have no jurisdiction. *Addyston Pipe Co. Case*, 175 U. S. 211, 232; *Boardman v. Lake Shore &c. Ry. Co.*, 84 N. Y. 157, 185.

Congress has the power to legislate upon the subject of consolidations of railroad corporations when the consolidations form interstate lines; in the absence of legislation by Congress, the power exists in the States to legislate upon the subject, but in the presence of legislation by Congress the power of the States over the subject is excluded. Noyes on Intercorporate Relations, § 19, citing *Louisville & Nashville v. Kentucky*, *supra*.

This exclusive jurisdiction of the Federal Government over commerce with foreign nations and among the States, and over the instrumentalities of such commerce, includes the power of police, or, that which is its equivalent, over those subjects in all its undefined breadth and fullness and which is just as full, complete, and far-reaching as is the police power of the state legislatures with reference to subjects

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within the [307] exclusive jurisdiction of the States. In either case there are no limitations to its exercise, except the constitutional guaranties in favor of life, liberty, and property. Thayer's Cases on Const. Law, 742, note; Cooley's Const. Lim. 723; Noyes on Intercorp. Rel. § 409.

Anti-trust statutes are enacted in the exercise of the police, or an analogous, power. *State v. Firemen's Fund Ins. Co.*, 152 Missouri, 46; *State v. Schlitz Brewing Co.*, 104 Tennessee, 715; *Waters-Pierce Co. v. State*, 19 Tex. Civ. App. 1.

Congress having the police power, or its equivalent, over foreign and interstate commerce and the instrumentalities thereof, may in exercising it, strike down restraints upon such commerce, whether they result from combinations and monopolies of the agencies of transportation or otherwise, just as a State could prohibit similar restraints upon interstate commerce. To contend otherwise is to contend that the Federal power over interstate and foreign commerce is not supreme, but is in some respects subordinate to state authority; that the police powers or the reserved powers of the States are, for some purposes, paramount to the powers of Congress in fields wherein the Federal Government has been invested by the Constitution with complete and supreme authority. This, of course, is not so. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661.

The *Louisville & Nashville Case*, *supra*, does not hold that Congress has no power to prohibit the consolidation of competing interstate railroads. Congress has created "the instruments of such commerce," and it has passed regulations concerning them, and the power to do these things is now unquestioned. *California v. Pacific Railway Co.*, 127 U. S. 1. What the court meant in the *Louisville Case* was that in respect of matters of a local nature, which did not admit or require uniform regulation, the States may "regulate the instruments of such commerce" until Congress legislates on the same subjects, while in respect of matters of national importance, or which admit of uniform regulation, the power [308] of the States is wholly excluded. The distinction was stated in *Welton v. Missouri*, 91 U. S. 275.

Ownership of a majority of its stock constitutes the control of a corporation when the inquiry is whether a combina-

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tion or monopoly has been formed to stifle competition between two or more rival and competing railroads. Noyes on Intercorp. Rel. § 294; *Farmers' L. & T. Co. v. N. Y. & C. R. R. Co.*, 150 N. Y. 410, 424; *People v. Chicago & Gas Trust Co.*, 130 Illinois, 268, 291; Greenhood on Public Policy, 5; *Richardson v. Crandall*, 48 N. Y. 343; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Milbank v. N. Y., L. E. & W.*, 64 How. (N. Y.) 29; *Pearsall v. Great Northern Railway*, 161 U. S. 646, 671; *Pullman Co. v. Mo. Pac. R. Co.*, 115 U. S. 587; *Pa. R. Co. v. Commonwealth*, 7 Atl. Rep. 368, 371.

The Great Northern and Northern Pacific Railway companies, competing interstate carriers, have been combined in violation of section 1 of the Anti-Trust Act, that is to say, a majority of the stock of each road has been transferred to a common trustee, the Securities Company, which is thus vested with the power to control and direct both roads for the common benefit of the stockholders of each.

The Anti-Trust Act condemns in express terms every "combination in the form of trust," and if those companies have been combined "in the form of trust," a violation of the very letter of the statute has been proved.

There is no great difficulty in getting at what Congress meant by a "trust." The meaning of the term was well understood in the economic and industrial world at the time of the passage of the Anti-Trust Act, and is now. The word was first used to describe an arrangement whereby the business of several competing corporations is centralized and combined by causing at least a majority of the stock of the constituent corporations to be transferred to a trustee, who, in return, issues to the stockholders "trust certificates." The trustee holds the legal title to the shares and has the right to vote them, and in this way exercises complete control over the [309] business of the combination. The trustee also receives the dividends on the shares, and out of these pays the former stockholders of the constituent corporations dividends on the "trust certificates." See Century Dictionary; Am. & Eng. Ency. Law, 2d ed., title Monopolies & Trusts; *State v. Standard Oil Co.*, 49 Ohio St. 137; Eddy on Combinations, § 582; Noyes on Intercorp. Rel. § 304; Dodd's Pamphlet on Combinations: Their Uses and Abuses. The facts show that the

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Northern Securities Company constitutes a trust—it has all the essential elements of one. It is a trustee, and as such holds the stock of two competing companies; it has the legal title, its stockholders have the equitable title, to the property. Morawetz, § 237, and cases cited. There is a trust agreement, the terms whereof are in the charter; it is sufficient to show an agreement if the stockholders acted in pursuance of *any* understanding plan or scheme, verbal or otherwise. *Harding v. Am. Glucose Co.*, 182 Illinois, 551. The certificates of stock of the company represent and fill the same office as trust certificates; the company has the power to vote the stock of both railways and thus elect the directors of both. As trustee, it collects the dividends on the stock of both companies and thereout pays dividends on its own stock exactly as a trustee of a trust collects and pays on the trust certificates.

It constitutes a trust in another light also. As the courts throughout the country held with practical unanimity that the class of “trusts” just described is illegal, a second class was invented of corporations that have acquired control of other corporations by purchasing their stock. This organization is of the same general character as the preceding, but the form is changed in order to escape the force of the decisions of the courts relating to corporate partnerships. Beach on Monopolies and Industrial Trusts, § 159. The Securities Company clearly comes within this second classification of “trusts.” Noyes on Intercorp. Rel. §§ 310, 285, 393; *People v. Chicago Gas Trust Co.*, 130 Illinois, 268, 292, 302, citing *Chicago Gas [310] Light Co. v. People's Gas Light Co.*, 121 Illinois, 530; *Am. Glucose Case, supra*.

It is not essential, however, to show that the Great Northern and Northern Pacific Railway companies have been combined in the technical form of “trust,” or “corporate combination,” as some writers call it when the trustee is a holding corporation. Section 1 of the Anti-Trust Act covers any and every form of combination. A violation of that section will have been established, therefore, if it is shown that—

Mr. Hill, Mr. Morgan, and the other individual defendants, acting in concert or in pursuance of a previous understanding, have caused the title to a majority of the shares of the

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Great Northern and Northern Pacific companies to be vested in a single person—the Securities Company—thereby centering the *control* of the two roads in a single head and in that way effecting a *combination* of them, the effect or tendency of which is to suppress competition between them.

When analyzed the disguise by which the defendants sought to hide the fact of the combination, and their connection therewith, appears so thin and transparent that it is a cause of wonder that they should ever have adopted such a flimsy device.

It may succeed for a time in baffling persons who may have an interest in preventing its being done and has succeeded, but it was a mere crafty contrivance to evade the requisition of the law. *Attorney-General v. The Great Northern Railway Company*, 6 Jur. (N. S.) 1006; *S. C.*, 1 Drew. & Smale, 159.

The defendants seem to have thought that they could procure the organization of a corporation and have it do what they could not lawfully do themselves or through the agency of natural persons, as if that which would have been illegal if done through the agency of a natural person would lose the stamp of illegality if done through the agency of a corporate organization; but see *Attorney General v. Central R. Co.*, 50 N. J. Eq. 52; *Ford v. Chicago Milk Shippers' Assn.*, 155 Ill. [311] nois, 166, 178, 180, citing *Morawetz*, § 227; 1 Kyd on Corp. 13; *State ex rel. v. Standard Oil Co.*, 49 Ohio St. 137; *Distilling and Cattle Feeding Co. v. People*, 156 Illinois. 448, 490.

Defendants insist that it is immaterial that a combination can be discovered by going behind the fiction that the Securities Company is a private person with an existence separate and apart from its members, because, as they say, the law will not allow that fiction to be disregarded or contradicted—will not allow the acts of the corporate entity to be treated as the acts of the natural persons who compose it. The defendants thus seek to defeat the ends of the law by a fiction invented to promote them. This proposition cannot be sustained. *People v. North River Sugar Rfg. Co.*, 121 N. Y. 582, 615.

It can never be a question as to whether parties to a com-

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bination in restraint of trade are individuals or corporations; it is always a question as to the nature, effect, and operation of the combination.

Of course a State has certain powers over the instrumentalities of commerce which it creates, as it has over the individuals by whom commerce is conducted. But a State has no power over either instrumentalities or individuals that can be interposed between them and the obligations imposed by a Federal statute regulating interstate commerce.

Where the subject is national in its character the Federal power is exclusive of the state power. *Welton v. Missouri*, 91 U. S. 280.

Congress has power to regulate commerce among the States, and when in the exercise of that power it becomes necessary to legislate respecting the instrumentalities of commerce, it may do so, irrespective of the question as to how or by what authority those instrumentalities were created.

And if regulation of the control of these instrumentalities is essential to prevent the subversion of a policy of Congress it may regulate that control.

[312] The power to regulate commerce among the several States includes the power to prevent restraint upon such commerce.

To restrain commerce is to regulate it.

Therefore any law of any State which restrains interstate commerce is invalid; and any contract between individuals or corporations, or any combination in any form which restrains such commerce is invalid.

The supreme power extends to the whole subject. Under this plenary power Congress has supervised interstate commerce from the granting of franchises to engage therein, to the most minute directions as to its operation. For this purpose it possesses all powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament of England. *In re Debs*, 158 U. S. 586; *Gilman v. Philadelphia*, 3 Wall. 725.

If the arrangement accomplishes that which the law prohibits, through the means which the law prohibits, it is certainly within the prohibition of the law, and if this *were* a consolidation under state *authority instead* of being a com-

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bination which effects that which defies the law of every foot of land which these railroads occupy, there should be no hesitation in saying that it violated the Federal statute, if it accomplished a restraint upon interstate commerce. To hold otherwise would be to read into the law a proviso to the effect that the act should not apply when the combination took the form of a railroad consolidation under authority of state legislation.

Fictions of law, invented to promote justice, can never be invoked to accomplish its defeat. "*In fictione juris semper equitas existit.*" *Mostyn v. Fabriges*, Cowper, 177; *Morris v. Pugh*, 3 Burr. 1243; Morawetz, §§ 1, 227; Taylor on Corporations, § 50; Clark and Marshall on Private Corporations, 17, 22; *State v. Standard Oil Co.*, 49 Ohio St. 137; *Ford v. Milk Shippers*, *supra*, and other cases cited *supra*.

The Northern Securities Company, in violation of section 2 of the Anti-Trust Act, has monopolized a part of interstate commerce by acquiring a large majority of the shares of the [313] capital stock of the Great Northern and Northern Pacific Railway companies—two parallel and competing lines engaged in interstate commerce; and the Northern Securities Company and the individual defendants, or two or more of them, have combined, each with the other, so to monopolize a part of interstate commerce.

From the facts and the argument already made it appears that by acquiring a majority of the shares of the Great Northern and Northern Pacific the Securities Company has obtained the control of, and, therefore, the power to suppress competition between, two rival and competing lines of railway engaged in interstate commerce, and in that way has monopolized a part of interstate commerce. This conclusion is sustained by the judgment of this court in the case of *Pearsall v. Great Northern Railway*, *supra*, which is conclusive of the case at bar, since it establishes the principle that to vest, designedly, in one person or set of persons, a majority of stock of two competing lines of interstate railway is to monopolize a part of interstate railroad traffic.

Even if a natural person could lawfully have done what the Securities Company has done, that would be no argument to prove that the Securities Company, in so doing, has

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not violated the law against monopolies. *People v. North River Sugar Refining Company*, *supra*, p. 625.

It is not denied that the very spirited contention that the construction the Government puts upon the law in question interferes with the power of people to do what they will with their property.

That was the very object of the law, and it was certainly contemplated that the rights of purchase, sale, and contract would be controlled, so far as necessary, to prevent those rights from being exercised to defeat the law.

A combination cannot be imagined coming into existence without more or less redistribution of property between individuals through purchases, sales, or contracts. Combinations are never bestowed upon us ready made.

[314] It must be remembered that the monopoly complained of is a monopoly of railway traffic resulting from centering in a single body controlling stock interests in two competing railways, and whatever may be the power of Congress or state legislatures over monopolies in general, they may unquestionably, in the exercise of their broad regulative powers over *quasi*-public corporations, prohibit any monopoly of railway transportation within their respective spheres of action.

As to the contention that the transaction is simply a sale of stock to an investor and to stamp it as illegal would be an unwarranted infringement upon the right of contract, and that the Securities Company never intended to take any active part in the controlling of the two companies, the argument is not sincere and it is demonstrated by the testimony of the individual defendants that the Securities Company was the designed instrument for directing and controlling the policies of the competing lines.

As to the circular of Mr. Hill to the stockholders, it is well settled that because a person has the right to purchase stock it does not follow that stockholders of two or more competing corporations can combine among themselves and with such person to sell him their stock and induce others to do the same, so as to center the controlling stock interests of the several corporations in a single head, in violation of statutes against combinations, consolidations, and monopolies. Noyes

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on Intercorp. Rel. § 36; *Penna. R. Co. v. Com.*, 7 Atl. Rep. 373.

This distinction between an actual *bona fide* sale, and one which is merely nominal and really a cloak under which to accomplish a combination sometimes leads to confusion of language or thought. See *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507; Noyes on Intercorp. Rel. § 354.

As to the argument of the appellants that the "acquiescence by the Government for more than eleven years in the merger and consolidation of many important parallel and competing [315] lines of railroad and steamships engaged in interstate commerce and foreign commerce has given a practical construction to the Anti-Trust Act of July 2, 1890, to the effect that it was not intended to forbid and does not forbid the natural processes of unification which are brought about under modern methods of lease, consolidation, merger, community of interest, or ownership of stock," there is no force whatever to the contention which the court below evidently deemed too flimsy even to refer to. But the answer to it is threefold—the case of a company formed for the purpose of holding stocks of two competing lines of interstate railways is a new one and arose for the first time in this case; the constitutionality of the act and its application to railroads was not settled until 1898 by the decision of *Trans-Missouri* and *Joint Traffic Cases*, *supra*; even if there had been acquiescence as to certain combinations it would not amount to an estoppel against the Government for prosecuting this action. *Louisville & Nashville v. Kentucky*, 161 U. S. 677, 689.

The combination and monopoly charged by the United States operate directly on interstate commerce, and do not affect it only indirectly, incidentally, or remotely. Noyes on Intercorp. Rel. § 392, and authorities there cited.

The question in this case is not whether the means by which the power of the combination is brought into play are direct or indirect, but whether the combination itself, whenever its power has been brought into play—it matters not how indirect may have been the means employed in bringing it into play—operates directly on interstate or international commerce. The failure of the defendants' counsel to bear this in

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mind has led them to make very elaborate arguments to show that the combination charged by the Government affects interstate commerce only indirectly and remotely. In reply to the contention on this point, see opinion of the court below, after citing *United States v. E. C. Knight Company*, 156 U. S. 1; *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604, on which counsel for defendants rely, [316] properly held that no combination could more immediately affect such commerce.

The relief granted by the Circuit Court was authorized by section 4 of the Anti-Trust Act.

The gist of the Government's charge being that a combination of the two railway companies has been formed by centering the title to a majority of their respective shares in the Securities Company, which by obtaining such majority of both stocks has acquired a monopoly—all in violation of the Anti-Trust Act and as unlawful combination and monopoly exists solely by virtue of the Securities Company's ownership of such majorities the logical and most direct way to destroy the combination and monopoly and prevent the continued violation of the statute is to strip such ownership, which was acquired in pursuance of an illegal object, of its powers and incidents—to disarm it of its power to violate the law. And this is what the Circuit Court did. Clearly this decree violates no rights of property which the Securities Company or any of the other defendants is entitled to claim.

It is proper to grant this relief even though the purpose of the company had already been accomplished. The combination charged by the Government is a combination of the two railways, formed by concentrating in the Securities Company the power to control both roads. This combination did not "come to an end," did not "accomplish its purpose," with the organization of the Securities Company, and therefore the violation of the Anti-Trust Act did not "come to an end" there, but continued on without interruption, and under the act the Circuit Courts can prevent, restrain, enjoin or otherwise prohibit violations thereof, and are left free to frame their remedial process to meet the exigencies of the case, and as courts of equity they enjoy the same wide latitude in formulating relief in cases of this class that they enjoy in any

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other class of cases within the jurisdiction of equity. *Taylor v. Simon*, 4 Mylne & Craig, 141; *Chicago, R. I. & P. Ry. Co. v. Union Pacific Ry. Co.*, 47 Fed. Rep. 15, 26.

[317] There is no defect of parties; all interests materially affected by the decree of the Circuit Court are represented by the parties before the court.

There were 1,300 persons who exchanged stock of the railway companies for stock of the Securities Company, and in a court of equity the interests of absent parties are represented when there are parties having similar interests before the court. *Smith v. Swornstedt*, 16 How. 288, 302.

Any question as to a defect of parties which might have existed has been removed from the case by the form of the decree entered by the Circuit Court, which simply adjudges that the parties defendant have entered into an unlawful combination and conspiracy in restraint of interstate commerce, and then proceeds to enjoin the defendants, the Securities Company, and the railway companies from doing the things which alone give life and force to the combination. The decree thus operates only on the parties to the bill and materially affects only their interests. The defendant corporations stand for the interests of their respective stockholders. *Sanger v. Upton*, 91 U. S. 59; *Hawkins v. Glenn*, 131 U. S. 329; *Minnesota v. Northern Securities Co.*, 184 U. S. 199.

MR. JUSTICE HARLAN announced the affirmance of the decree of the Circuit Court, and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, citizens of New York.

Its general object was to enforce, as against the defendants, the provisions of the statute of July 2, 1890, commonly

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known as the Anti-Trust Act, and entitled "An act to protect trade [318] and commerce against unlawful restraints and monopolies." 26 Stat. 209. By the decree below the United States was given substantially the relief asked by it in the bill.

As the act is not very long, and as the determination of the particular questions arising in this case may require a consideration of the scope and meaning of most of its provisions, it is here given in full:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, [319] or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the

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district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

"SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the dis- [320] trict in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"SEC. 8. That the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Is the case as presented by the pleadings and the evidence one of a combination or a conspiracy in restraint of trade or commerce among the States, or with foreign states? Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopolize any part of such trade or commerce? Let us see what are the facts disclosed by the record.

The Great Northern Railway Company and the Northern Pacific Railway Company owned, controlled and operated separate lines of railway—the former road extending from Superior, and from Duluth and St. Paul, to Everett, Seattle, and Portland, with a branch line to Helena; the latter, extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma and Portland. The two lines, main and branches, about 9,000 miles in length, were and are parallel and competing lines across the continent through the northern tier of States between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with seagoing vessels.

Prior to 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized under certain acts and resolutions of Congress. That company becoming insolvent, its

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road and property passed into the hands of receivers appointed by courts of the United States. In advance of foreclosure and [321] sale a majority of its bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the two systems, and for giving the practical control of the Northern Pacific to the Great Northern. That was the arrangement declared in *Pearsall v. Great Northern Railway Company*, 161 U. S. 646, to be illegal under the statutes of Minnesota which forbade any railroad corporation or the purchasers or managers of any corporation, to consolidate the stock, property or franchises of such corporation, or to lease or purchase the works or franchises of, or in any way control, other railroad corporations owning or having under their control parallel or competing lines. Gen. Laws, Minn. 1874, c. 29; ch. 1881.

Early in 1901 the Great Northern and Northern Pacific Railway companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital stock of the Chicago, Burlington and Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Railway companies, payable in twenty years from date, with interest at 4 per cent per annum. In this manner the two purchasing companies became the owners of \$107,000,000 of the \$112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, whose lines aggregated about 8,000 miles, and extended from St. Paul to Chicago and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne and Billings, where it connected with the Northern Pacific railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington and Quincy main line and branches.

Prior to November 13, 1901, defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, [322] under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company, with

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a capital stock of \$400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies to enhance the value of their stocks. In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus, as stated in Article VI of the bill, "by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

In pursuance of this combination and to effect its objects, the defendant, the Northern Securities Company, was organized November 13, 1901, under the laws of New Jersey.

Its certificate of incorporation stated that the objects for which the company was formed were: "1. To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the [323] State of New Jersey, or of any other State, Territory or country. 2. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State,

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Territory or country, and while owner thereof to exercise all the rights, powers and privileges of ownership. 3. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner of such stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon. 4. To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock. 5. To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business.

It was declared in the certificate that the business or purpose of the corporation was from time to time to do any one or more of such acts and things, and that the corporation should have power to conduct its business in other States and in foreign countries, and to have one or more offices, and hold, purchase, mortgage and convey real and personal property, out of New Jersey.

The total authorized capital stock of the corporation was fixed at \$400,000,000, divided into 4,000,000 shares of the par value of \$100 each. The amount of the capital stock with which the corporation should commence business was fixed at \$30,000. The duration of the corporation was to be perpetual.

This charter having been obtained, Hill and his associate stockholders of the Great Northern Railway Company, and [324] Morgan and associate stockholders of the Northern Pacific Railway Company, assigned to the Securities Company a controlling amount of the capital stock of the respective constituent companies upon an agreed basis of exchange of the capital stock of the Securities Company for each share of the capital stock of the other companies.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant rail-

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way companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof, in the organization, management and operation of said railway companies and in the receipt and control of their earnings."

No consideration whatever, the bill alleges, has existed or will exist, for the transfer of the stock of the defendant railway companies to the Northern Securities Company, other than the issue of the stock of the latter company for the purpose, after the manner, and upon the basis stated.

The Securities Company, the bill also alleges, was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway companies, but solely "to incorporate the pooling of the stocks of said companies," and carry into effect the above combination; that it is a mere depositary, custodian, holder or trustee of the stocks of the Great Northern and Northern Pacific Railway companies; that its shares of stock are but beneficial certificates against said railroad stocks to designate the interest of the holders in the pool; that it does not have and never had any capital to warrant such an operation; that its subscribed capital was but \$30,000, and its authorized capital stock of \$400,000,000 was just sufficient, when all issued, to represent [325] and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway companies, upon the basis and at the rate agreed upon, which was about \$122,000,000 in excess of the combined capital stock of the two railway companies taken at par; and that, unless prevented, the Securities Company would acquire as owner and proprietor substantially all the capital stock of the Great Northern and Northern Pacific Railway companies, issuing in lieu thereof its own capital stock to the full extent of its authorized issue, of which, upon the agreed basis of exchange, the former stockholders of the Great Northern Railway Company have re-

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ceived or would receive and hold about fifty-five per cent, the balance going to the former stockholders of the Northern Pacific Railway Company.

The Government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the National Government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the States or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several States and with foreign nations, and forbids attempts to monopolize such commerce or any part of it.

Summarizing the principal facts, it is indisputable upon this [326] record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should hold the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of

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the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership*. Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation the principal, if not the sole, object for the formation of which was to carry out the purpose of the original [327] combination under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interest, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise

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* * * in restraint of commerce among the several States or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust;" but if not, it is a *combination in restraint of interstate and international commerce*; and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory.

The Circuit Court was undoubtedly right when it said—all the Judges of that court concurring—that the combination referred to "led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies." 120 Fed. Rep. 721, 724.

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

The contention of the Government is that, if regard be had to former adjudications, the present case must be determined in its favor. That view is contested and the

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defendants insist that a decision in their favor will not be inconsistent with anything heretofore decided and would be in harmony with the act of Congress.

Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the States or with foreign nations? Or, does it embrace only such restraints as are unreasonable in their nature? Is the motive with which a forbidden combination or conspiracy was formed at all material when it appears that the necessary tendency of the particular combination or conspiracy in question is to restrict or suppress free competition between competing railroads engaged in commerce among the States? Does the act of Congress prescribe, as a rule for *interstate* or *international* commerce, that the operation of the natural laws of competition between those engaged in *such* commerce shall not be restricted or interfered with by any contract, combination or [329] conspiracy? How far may Congress go in regulating the affairs or conduct of state corporations engaged as carriers in commerce among the States or of state corporations which, although not directly engaged themselves in *such* commerce, yet have control of the business of interstate carriers? If state corporations, or their stockholders, are found to be parties to a combination, in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress?

These questions were earnestly discussed at the bar by able counsel, and have received the full consideration which their importance demands.

The first case in this court arising under the Anti-Trust Act was *United States v. E. C. Knight Co.*, 156 U. S. 1. The next case was that of *United States v. Trans-Missouri Freight Association*, 166 U. S. 290. That was followed by *United States v. Joint Traffic Association*, 171 U. S. 505, *Hopkins v. United States*, 171 U. S. 578, *Anderson v. United States*, 171 U. S. 604, *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, and *Montague & Co. v. Lowry*, 193 U. S. 38. To these may be added *Pearsall v. Great North-*

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ern Railway, 161 U. S. 646, which, although not arising under the Anti-Trust Act, involved an agreement under which the Great Northern and Northern Pacific Railway companies should be consolidated and by which competition between those companies was to cease. In *United States v. E. C. Knight Co.*, it was held that the agreement or arrangement there involved had reference only to the manufacture or production of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce, it would then have been covered by the Anti-Trust Act and would have been illegal; in *United States v. Trans-Missouri Freight Association*, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules and regulations in respect [330] of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust Act; in *United States v. Joint Traffic Association*, that an arrangement between certain railroad companies in reference to railroad traffic among the States, by which the railroads involved were not subject to competition among themselves, was also forbidden by the act; in *Hopkins v. United States* and *Anderson v. United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Addyston Pipe & Steel Co. v. United States*, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale and transportation of iron pipe, whereby competition among them was avoided, was covered by the Anti-Trust Act; and in *Montague v. Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private

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manufacturers and dealers in tiles, grates and mantels, in different States, whereby they controlled or sought to control the price of such articles in those States, was condemned by the act of Congress. In *Pearsall v. Great Northern Railway*, which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway companies, the court said: "The consolidation of these two great corporations will unavoidably result in giving to the defendant [the Great Northern] a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota Legislature of 1874 and 1881 undoubtedly [331] reflected the general sentiment of the public, that their best security is in competition."

We will not incumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations*;

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations even among *private* manufacturers or dealers whereby *interstate or international commerce* is restrained are equally embraced by the act;

That Congress has the power to establish *rules* by which

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interstate and international commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce;

[332] That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties. In our opinion, the recognition of the principles announced in former cases must, under the conceded facts, lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case are of a substantial character. We will now consider those objections.

Underlying the argument in behalf of the defendants is the idea that as the Northern Securities Company is a state cor-

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poration, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway companies is not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the States creating those corporations. This suggestion does not at all impress us. There is no reason to suppose that Congress had any purpose [333] to interfere with the internal affairs of the States, nor, in our opinion, is there any ground whatever for the contention that the Anti-Trust Act regulates their domestic commerce. By its very terms the act regulates only commerce among the States and with foreign states. Viewed in that light, the act, if within the powers of Congress, must be respected; for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance of its provisions, are the supreme law of the land, "anything in the constitution or laws of any State to the contrary notwithstanding"—supreme over the States, over the courts, and even over the people of the United States, the source of all power under our governmental system in respect of the objects for which the National Government was ordained. An act of Congress constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligation of an oath so to regard a lawful enactment of Congress. Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the Government and its laws might be prostrated at the feet of local authority. *Cohens v. Virginia*, 6 Wheat. 264, 385, 414. These views have been often expressed by this court.

It is said that whatever may be the power of a State over such subjects Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporation be engaged in interstate and international commerce; that the holding or purchase by a state corporation, or the purchase by individuals, of the stock of another corpo-

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ration, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens or state corporations may dispose of their property and invest their money in any way they choose; and that in regard to all [334] such matters, citizens and state corporations are subject, if to any authority, only to the lawful authority of the State in which such citizens reside, or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. The court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.

In this connection, it is suggested that the contention of the Government is that the acquisition and *ownership* of stock in a state railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. This suggestion is made in different ways, sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in state railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can acquire and hold stock in other state corporations. Still further, it is asked, generally, whether the organization or ownership of railroads is not under the control of the States under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate

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commerce by any means that are appropriate and that are lawful and not prohibited [335] by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed. What the Government particularly complains of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act? May not Congress declare that *combination* to be illegal? If Congress legislates for the protection of the public, may it not proceed on the ground that wrongs when effected by a powerful combination are more dangerous and require more stringent supervision than when they are to be effected by a single person? *Callan v. Wilson*, 127 U. S. 540, 556. How far may the courts go in order to give effect to the act of Congress, and remedy the evils it was designed by that act to suppress? These are confessedly questions of great moment, and they will now be considered.

By the express words of the Constitution, Congress has power to "regulate commerce with foreign nations and among the several States, and with the Indian tribes." In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power. In some circumstances regulation may properly take the form and have the effect of prohibition. *In re Rahrer*, 140 U. S. 545; *Lottery Case* 188 U. S. 321, 355, and authorities there cited. Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice Marshall for the court in *Gibbons v. Ogden*, 9 Wheat. 1, 196, 197, that the power of Congress to regulate commerce among the States and with foreign nations is the power "to prescribe the *rule* by which commerce *is to be governed*;" that such power "is complete [336] in itself,

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may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" that "if, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States, is vested in Congress *as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States;*" that a sound construction of the Constitution allows to Congress a large discretion, "with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional." *Brown v. Maryland*, 12 Wheat. 419; *Sinnot v. Davenport*, 22 How. 227, 238; *Henderson v. The Mayor*, 92 U. S. 259; *Railroad Company v. Husen*, 95 U. S. 465, 472; *County of Mobile v. Kimball*, 102 U. S. 691; *M., K. & Texas Ry. Co. v. Haber*, 169 U. S. 613, 626; *The Lottery Case*, 188 U. S. 321, 348. In *Cohens v. Virginia*, 6 Wheat. 264, 413, this court said that the United States were for many important purposes "a single nation," and that "in all commercial regulations we are one and the same people;" and it has since frequently declared that commerce among the several States was a *unit*, and subject to national control. Previously, in *McCulloch v. Maryland*, 4 Wheat. 316, 405, the court had said that the Government ordained and established by the Constitution was, within the limits of the powers granted to it, "the Government of all; its powers are delegated by all; it represents all, and acts for all," and was "supreme within its sphere of action." As late as the case of *In re Debs*, 158 U. S. 564, 582, this court, every member of it concurring, said: "The entire strength of the Nation may be used to enforce in any part of the land the [337] full and free exercise of all National powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be

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put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws."

The means employed in respect of the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule for interstate and international commerce*, (not for domestic commerce,) that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare [338] will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that

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must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

It is said that railroad corporations created under the laws of a State can only be consolidated with the authority of the State. Why that suggestion is made in this case we cannot understand, for there is no pretense that the combination here in question was under the authority of the States under whose laws these railroad corporations were created. But even if the State allowed consolidation it would not follow that the stockholders of two or more state railroad corporations, having *competing lines and engaged in interstate commerce*, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the act of Congress, restrain commerce among the States and with foreign nations.

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. And we cannot be in any doubt as to the reason that moved Congress to the incorporation of that rule into a statute. That reason was thus stated in *United States v. Joint Traffic Association*: "Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has. . . . It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting *as one body* in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, *so far as the combination operates upon and restrains interstate commerce*, Congress has power to legislate and to prohibit." (pp. 569, 571.) That such a rule was applied to interstate commerce [339] should not have surprised any one. Indeed, when Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with

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combinations that were in restraint of their domestic commerce. The decisions in state courts upon this general subject are not only numerous and instructive but they show the circumstances under which the Anti-Trust Act was passed. It may well be assumed that Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare.

In *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 186, the Supreme Court of Pennsylvania dealt with a combination of coal companies seeking the control within a large territory of the entire market for bituminous coal. The court, observing that the combination was wide in its scope, general in its influence, and injurious in its effects, said:

"When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the Lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the prices fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master and the fires of the manufacturer all feel the restraint, while many dependent hands are [340] paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offense. * * * In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the combination of many what severally no one could accomplish, and even what when done by one would be innocent. * * * There is a potency in numbers when combined, which the law cannot overlook, where injury is the consequence."

The same principles were applied in *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558, 565, which was the case of a combination of two coal companies, in order to give one of them a monopoly of coal in a particular region, the Court of Appeals of New York holding that "A combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal."

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They were also applied by the Supreme Court in Ohio in *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672, which was the case of a combination among manufacturers of salt in a large salt-producing territory, the court saying:

"It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. *Courts will not stop to enquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.*"

So, in *Craft v. McConoughy*, 79 Illinois, 346, 350, which was the case of a combination among grain dealers by which competition was stifled, the court saying:

"So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly [341] against which the public interest had no protection."

Again, in *People v. Chicago Gas Trust Co.*, 130 Illinois, 268, 297, which involved the validity of the organization of a gas corporation which obtained a monopoly in the business of furnishing illuminating gas in the city of Chicago by buying the stock of four other gas companies, it was said:

"Of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?"

To the same effect are cases almost too numerous to be cited. But among them we refer to *Richardson v. Buhl*, 77 Michigan, 632, which was the case of the organization of a corporation in Connecticut to unite in one corporation all the match manufacturers in the United States, and thus to obtain control of the business of manufacturing matches; *Santa Clara Mill & Lumber Co. v. Hayes*, 76 California, 387, 390, which was the case of a combination among manufacturers of lumber, by which it could control the business in certain localities; and *India Bagging Association v. Kock*, 14 Ia. Ann. 168, which was the case of a combination among various commercial firms to control the prices of bagging used by cotton planters.

The cases, just cited, it is true, relate to the domestic commerce of the States. But they serve to show the authority

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which the States possess to guard the public against combinations that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within their limits. They serve also to give point to the declaration of this court in *Gibbons v. Ogden*, 9 Wheat. 1, 197—a principle never modified by any subsequent decision—that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument,” the power over commerce with foreign nations and among the several States is vested in Congress as absolutely [342] as it would be in a single government having in its constitution the same restrictions on the exercise of power as are found in the Constitution of the United States.” Is there, then, any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce? If a State may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it?

Now, the court is asked to adjudge that, if held to embrace the case before us, the Anti-Trust Act is repugnant to the Constitution of the United States. In this view we are unable to concur. The contention of the defendants could not be sustained without, in effect, overruling the prior decisions of this court as to the scope and validity of the Anti-Trust Act. If, as the court has held, Congress can strike down a combination between private persons or private corporations that restrains trade among the States in iron pipe (as in *Addyston Pipe & Steel Co. v. United States*), or in tiles, grates and mantels (as in *Montague v. Lowry*), surely it ought not to be doubted that Congress has power to declare illegal a combination that restrains commerce among the States, and with foreign nations, as carried on over the lines of competing railroad companies exercising public franchises, and engaged in such commerce. We cannot agree that Con-

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gress may strike down combinations among manufacturers and dealers in iron pipe, tiles, grates and mantles that restrain commerce among the States in such articles, but may not strike down combinations among stockholders of competing railroad carriers, which restrain commerce as involved in the transportation of passengers and property among the several States. If private parties may not, by combination among themselves, restrain interstate [343] and international commerce in violation of an act of Congress, much less can such restraint be tolerated when imposed or attempted to be imposed upon commerce as carried on over public highways. Indeed, if the contentions of the defendants are sound why may not *all* the railway companies in the United States, that are engaged, under state charters, in interstate and international commerce, enter into a combination such as the one here in question, and by the device of a holding corporation obtain the absolute control throughout the entire country of rates for passengers and freight, beyond the power of Congress to protect the public against their exactions? The argument in behalf of the defendants necessarily leads to such results, and places Congress, although invested by the people of the United States with full authority to regulate interstate and international commerce, in a condition of utter helplessness, so far as the protection of the public against such combinations is concerned

Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates—and upon that question we express no opinion—it does not choose to exercise its power in that way or to that extent. It has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no farther than to protect the freedom of commerce among the States and with foreign states by declaring illegal all contracts, combinations, conspiracies or monopolies in restraint of such commerce, and make it a public offence to violate the rule thus prescribed. How much further it may go, we do not now say. We need only

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at this time consider whether it has exceeded its powers in enacting the statute here in question.

Assuming, without further discussion, that the case before us is within the terms of the act, and that the act is not in excess of the powers of Congress, we recur to the question, how far may the courts go in reaching and suppressing the combination [§44] described in the bill? All will agree that if the Anti-Trust Act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure. And all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the States and with foreign nations. Equally, we assume, all will agree that the Constitution and the legal enactments of Congress are, by express words of the Constitution, the supreme law of the land, anything in the constitution and laws of any State to the contrary notwithstanding. Nevertheless, the defendants, strangely enough, invoke in their behalf the Tenth Amendment of the Constitution which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the People;" and we are confronted with the suggestion that any order or decree of the Federal court which will prevent the Northern Securities Company from exercising the power it acquired in becoming the holder of the stocks of the Great Northern and Northern Pacific Railway companies will be an invasion of the rights of the State under which the Securities Company was chartered, as well as of the rights of the States creating the other companies. In other words, if the State of New Jersey gives a charter to a corporation, and even if the obtaining of such charter is in fact pursuant to a *combination* under which it becomes the holder of the stocks of shareholders in two competing, parallel railroad companies engaged in interstate commerce in other States, whereby competition between the respective

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roads of those companies is to be destroyed and the enormous commerce carried on over them restrained by suppressing competition, Congress must stay its hands and allow [345] such restraint to continue to the detriment of the public because, forsooth, the corporations concerned or some of them are state corporations. We cannot conceive how it is possible for any one to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained for a moment.

It is proper to say in passing that nothing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant States of the Union. The purpose of the combination was concealed under very general words that gave no clue whatever to the real purposes of those who brought about the organization of the Securities Company. If the certificate of the incorporation of that company had expressly stated that the object of the company was to destroy competition between competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.

We reject any such view of the relations of the National Government and the States composing the Union, as that for which the defendants contend. Such a view cannot be maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court as to the powers of the National Government over matters committed to it. No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for

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such com- [346] merce. It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. And yet the suggestion is made that to restrain a state corporation from interfering with the free course of trade and commerce among the States, in violation of an act of Congress, is hostile to the reserved rights of the States. The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from coöperating with the Securities Company in restraining commerce among the States. In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States. The affirmance of the judgment below will only mean that no combination, however powerful, is stronger than the law or will be permitted to avail itself of the pretext that to prevent it doing that which, if done, would defeat a legal enactment of Congress, is to attack the reserved rights of the States. It [347] would mean that the Government which represents all, can, when acting within the limits of its powers, compel obedience to its authority. It would mean

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that no device in evasion of its provisions, however skillfully such device may have been contrived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination by its operation directly restrains commerce among the States or with foreign nations in violation of the act of Congress.

The defendants rely, with some confidence, upon the case of *Railroad Company v. Maryland*, 21 Wall. 456, 473. But nothing we have said is inconsistent with any principle announced in that case. The court there recognized the principle that a State has plenary powers "over its own territory, its highways, its franchises, and its corporations," and observed that "we are bound to sustain the constitutional powers and prerogatives of the States, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences." Of course, every State has, in a general sense, plenary power over its corporations. But is it conceivable that a State, when exerting power over a corporation of its creation, may prevent or embarrass the exercise by Congress of any power with which it is invested by the Constitution? In the case just referred to the court does not say, and it is not to be supposed that it will ever say, that any power exists in a State to prevent the enforcement of a lawful enactment of Congress, or to invest any of its corporations, in whatever business engaged, with authority to disregard such enactment or defeat its legitimate operation. On the contrary, the court has steadily held to the doctrine, vital to the United States as well as to the States, that a state enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions. This results, the court has said, as well from the nature of the Gov- [348] ernment as from the words of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1, 210; *Sinnot v. Davenport*, 22 How. 227, 243; *In re Debs*, 158 U. S. 564; *Missouri, Kansas & Texas Railway v. Haber*, 169 U. S. 613, 626, 627. In *Texas v. White*, 7 Wall. 700, 725, the court remarked "that 'the people of each State compose a State, having its own government, and endowed with all the func-

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tions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' *County of Lane v. Oregon*, 7 Wall. 76. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." These doctrines are at the basis of our Constitutional Government, and cannot be disregarded with safety.

The defendants also rely on *Louisville & Nashville Railroad v. Kentucky*, 161 U. S. 677, 702. In that case it was contended by the railroad company that the assumption of the State to forbid the consolidation of parallel and competing lines was an interference with the power of Congress over interstate commerce. The court observed that but little need be said in answer to such a proposition, for "it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers." But that case distinctly recognized that there was a division of power between Congress and the States in respect to interstate railways, and that Congress had the superior right to control that commerce and forbid interference therewith, while to the States remained the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests. If there is anything in that case which [349] even intimates that a State or a state corporation may in any way directly restrain interstate commerce, over which Congress has, by the Constitution, complete control, we have been unable to find it.

The question of the relations of the General Government with the States is again presented by the specific contention of each defendant that Congress did not intend "to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine

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who may buy, own and sell their stock." All that is true, generally speaking, but the contention falls far short of meeting the controlling questions in this case. To meet this contention we must repeat some things already said in this opinion. But if what we have said be sound, repetition will do no harm. So far as the Constitution of the United States is concerned, a State may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind; domestic, interstate and international. The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government, or any legal enactment of Congress. A State, if it chooses so to do, may even submit to the existence of combinations within its limits that restrain its internal trade. But neither a state corporation nor its stockholders can, by reason of the non-action of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is by the Constitution under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of that commerce. If it were otherwise, the declaration in the Constitu- [350] tion of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words. Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress*. No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence. We repeat that no State can endow any of its corporations, or any combination of its citizens, with

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authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. Harm and only harm can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases, or because the rule, in its operation, may possibly affect the interests of business, is to endanger the safety and integrity of our institutions and make the Constitution mean not what it says but what interested parties wish it to mean at a particular time and under particular circumstances. The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in *United States v. Lee*, 106 U. S. 196, 220, is the only supreme power in our system of government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the Government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution. If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it [351] did not so declare. But if nothing more can be said than that Congress has erred—and the court must not be understood as saying that it has or has not erred—the remedy for the error and the attendant mischief is the selection of new Senators and Representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law.

Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this

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country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. In this, as in former cases, they seek shelter behind the reserved rights of the States and even behind the constitutional guarantee of liberty of contract. But this court has heretofore adjudged that the act of Congress did not touch the rights of the States, and that liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce. **Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed.** Nor does the enforcement of a legal enactment of Congress infringe, in any proper sense, the general inherent right of every one to acquire and hold property. That right, like all other rights, must be exercised in subordination to the law.

But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin [352] in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. We need only say that Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has, in effect declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy or monopoly that will restrain such commerce, by preventing the free operation of competi-

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tion among interstate carriers engaged in the transportation of passengers and freight. This court cannot disregard that declaration unless Congress, in passing the statute in question, be held to have transgressed the limits prescribed for its action by the Constitution. But, as already indicated, it cannot be so held consistently with the provisions of that instrument.

The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations cannot be made paramount to the interests of the general public. Under the Articles of Confederation commerce among the original States was subject to vexatious and local regulations that took no account of the general welfare. But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the States and with foreign [353] nations. In *Brown v. Maryland*, 12 Wheat. 419, 446, it was said:

"Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress."

Railroad companies, we said in the *Trans-Missouri Freight Association* case, "are instruments of commerce, and their business is commerce itself." And such companies, it must be remembered, operate "public highways, established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." *Cherokee Nation v. Kansas Railway Co.*, 135 U. S. 641, 657; *Chicago &c. R. R. Co. v. Pullman Car Co.*, 139 U. S. 79, 90; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 475; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 332; *Smyth v. Ames*, 169 U. S. 466, 544; *Lake Shore &c. Ry. Co. v. Ohio*, 173 U. S. 285, 301. When such

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carriers, in the exercise of public franchises, engage in the transportation of passengers and freight among the States they become—even if they be state corporations—subject to such rules as Congress may lawfully establish for the conduct of interstate commerce.

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent com- [354] panies. If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, "Why put the stocks of *both* these [constituent companies] into one holding company?" He frankly answered: "In the first place, this holding company was simply a question of *custodian*, because it had no other alliances." That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States v.*

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Joint Traffic Association) "smothering" competition between the lines of two railway carriers.

We will now inquire as to the nature and extent of the relief granted to the Government by the decree below.

By the decree in the Circuit Court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several States, such as the act of Congress denounced as illegal; and that all of the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, claimed to be owned and held by the Northern Securities Company, was acquired, and is by it held, in virtue of such com- [355] bination or conspiracy, in restraint of trade and commerce among the several States. It was therefore decreed as follows:

"That the Northern Securities Company, its officers, agents, servants and employes, be and they are hereby enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies, which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, The Northern Securities Company, may have heretofore received from such stock- [356] holders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

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Subsequently, and before the appeal to this court was perfected, an order was made in the Circuit Court to this effect:

"That upon the giving of an approved bond to the United States by or on behalf of the defendants in the sum of fifty thousand dollars conditioned to prosecute their appeal with effect and to pay all damages which may result to the United States from this order, that portion of the injunction contained in the final decree herein which forbids the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, from paying dividends to the Northern Securities Company on account of stock in either of the railway companies which the Securities Company claims to own and hold, is suspended during the pendency of the appeal allowed herein this day. All other portions of the decree and of the injunction it contains remain in force and are unaffected by this order."

No valid objection can be made to the decree below, in form or in substance. If there was a combination or conspiracy in violation of the act of Congress, between the stockholders of the Great Northern and the Northern Pacific Railway companies, whereby the Northern Securities Company was formed as a holding corporation, and whereby interstate commerce over the lines of the constituent companies was restrained, it must follow that the court, in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which being done would affect the result denounced by the act. To say that the court could not go so far is to say that it is powerless to enforce the act or to suppress the illegal combination, and powerless [357] to protect the rights of the public as against that combination.

It is here suggested that the alleged combination had accomplished its object before the commencement of this suit, in that the Securities Company had then organized, and had actually received a majority of the stock of the two constituent companies; *therefore*, it is argued, no effective relief can now be granted to the Government. This same view was pressed upon the Circuit Court, and was rejected. It was completely answered by that court when it said:

"Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no

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such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the Government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it."

The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but [358] the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.

It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention as disclosed by the words used.

As early as the case of *King v. Inhabitants of Hodnett*, 1 T. R. 96, 101, Mr. Justice Buller said:

"It is not true that the courts in the exposition of penal statutes are to narrow the construction."

In *United States v. Wiltberger*, 5 Wheat. 76, 95, Chief Justice Marshall, delivering the judgment of this court and referring to the rule that penal statutes are to be construed strictly, said:

"It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be

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construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."

In *United States v. Morris*, 14 Pet. 464, 475, this court, speaking by Chief Justice Taney, said:

"In expounding a penal statute the court certainly will not extend it beyond [359] the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction. 5 Wheat. 95."

So, in *The Schooner Industry*, 1 Gall. 114, 117, Mr. Justice Story said:

"We are undoubtedly bound to construe penal statutes strictly; and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs to be within the remedial influence of the statute."

In another case the same eminent jurist said:

"I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. * * * In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes the best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *United States v. Winn*, 3 Sumner, 209, 211, 212.

In *People v. Bartow*, 6 Cowen, 290, the highest court of New York said:

"Although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature. Among other things, it is well settled that a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction."

So, in *Commonwealth v. Martin*, 17 Massachusetts, 359, 362, the highest court of Massachusetts said:

"If a statute, creating or increasing a penalty, be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty is to be adopted; but it is not justifiable in this, any more than in any other case, to imagine ambiguities, merely that a lenient construction may be adopted. If such were the privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms, as to [360] preclude the exercise of ingenuity in raising doubts about its construction."

Mr. Justice Brewer, concurring.

There are cases almost without number in this country and in England to the same effect.

Guided by these long-established rules of construction, it is manifest that if the Anti-Trust Act is held not to embrace a case such as is now before us, the plain intention of the legislative branch of the Government will be defeated. If Congress has not, by the words used in the act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them. This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of the act," § 4; and the court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results—such results as law and justice demand. The defendants have no just cause to complain of the decree, in matter of law, and it should be affirmed.

The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require.

Affirmed.

MR. JUSTICE BREWER, concurring.

I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with the majority of the court in the decision in *United States v. Freight Association*, 166 U. S. 290, followed by the cases of *United States v. Joint Traffic Association*, 171 U. S. 505, *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, and *Montague & Co. v. Lowry*, 193 U. S. 38, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, [361] I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were un-

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reasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall v. Great Northern Railway*, 161 U. S. 646, in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the [362] Northern Pacific Railway Company:

"Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common."

But no such investment by a single individual of his means is here presented. There was a combination by several indi-

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viduals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of \$400,000,000, had no means of its own; \$30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could [363] the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of \$201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation holding the majority of the stock in the Northern Securities Company and acting in obedience to the wishes of a majority of its stockholders would control the action of the Securities Company and through it the action of the two railroad companies, and this process might be extended until a single cor-

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poration whose stock was owned by three or four parties would be in practical control of both roads, or, having before us the possibilities of combination, the control of the whole transportation system of the country. I cannot believe that to be a reasonable or lawful restraint of trade.

Again, there is by this suit no interference with state control. It is a recognition rather than a disregard of its action. This merging of control and destruction of competition was not authorized, but specifically prohibited by the State which created one of the railroad companies, and within whose boundaries the lines of both were largely located and much of their business transacted. The purpose and policy of the State are therefore enforced by the decree. So far as the work of the two railroad companies was interstate commerce, it was subject to the control of Congress, and its purpose and policy were expressed in the act under which this suit was brought.

It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce—one in conflict with state law and within the letter and spirit of the statute and the power of Congress. Therefore I concur in the judgment of affirmance.

[364] I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation.

MR. JUSTICE WHITE, with whom concurred MR. CHIEF JUSTICE FULLER, MR. JUSTICE PECKHAM, and MR. JUSTICE HOLMES, dissenting.

The Northern Securities Company is a New Jersey corporation; the Great Northern Railway Company, a Minnesota one; and the Northern Pacific Railway Company,

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a Wisconsin corporation. Whilst in the argument at bar the Government referred to the subject, nevertheless it expressly disclaimed predicating any claim for relief upon the fact that the predecessor in title of the Northern Pacific Railway Company was a corporation created by act of Congress. That fact, therefore, may be eliminated.

The facts essential to be borne in mind to understand my point of view, without going into details, are as follows: The lines of the Northern Pacific and the Great Northern Railway companies are both transcontinental, that is, trunk lines to the Pacific Ocean, and in some aspects are conceded to be competing. Mr. Morgan and Mr. Hill and a few persons immediately associated with them separately acquired and owned capital stock of the Northern Pacific Railway Company, aggregating a majority thereof. Mr. Hill and others associated with him owned, in the same manner, about one-third of the capital stock of the Great Northern Railway Company, the balance of the stock being distributed among about eighteen hundred stockholders. Although Mr. Hill and his immediate associates owned only one-third of the stock, the confidence reposed in Mr. Hill was such that, through proxies, his influence was dominant in the affairs of that company. [365] Under these circumstances Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads. This was to be effected by having the Northern Securities Company give its stock in exchange for that of the two railroad companies. Whilst the purpose of the promoters was mainly to exchange the stock held by them in the two railroads for the Northern Securities Company stock, nevertheless the right of stockholders generally in the two railroads to make a similar exchange or to sell their stock to the Securities Company was provided for. Under the arrangement the Northern Securities Company came to be the registered holder of a majority of the stock of both the railroads. It is not denied that the charter, and the acts done under it, of the Northern Securities Company, were authorized by the laws of New Jersey, and, therefore, in so far as those laws were com-

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petent to sanction the transaction, the corporation held the stock in the two railroads secured by the law of the State of its domicil.

The government by its bill challenges the right of the Northern Securities Company to hold and own the stock in the two railroads. The grounds upon which the relief sought was based were, generally speaking, as follows: That as the two railroads were competing lines engaged in part in interstate commerce, the creation of the Northern Securities Company and the acquisition by it of a majority of the stock of both roads was contrary to the act of Congress known as the Anti-Trust Act. 26 Stat. 209. The clauses of the act which it was charged were violated were the first section, declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations;" and the provisions of the second section making it a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several [366] States or with foreign nations." The court below sustained the contentions of the government. It, therefore, enjoined the two railroad companies from allowing the Northern Securities Company to vote the stock standing in its name or to pay to that company any dividends upon the stock by it held. On the giving, however, of a bond fixed by the court below the decree relating to the payment of dividends was suspended pending the appeal to this court.

The court recognized, however, the right of the Northern Securities Company to retransfer the stock in both railroads to the persons from whom it had been acquired. The correctness of the decree below is the question presented for decision.

Two questions arise. Does the Anti-Trust Act, when rightly interpreted, apply to the acquisition and ownership by the Northern Securities Company of the stock in the two railroads, and, second, if it does, had Congress the power to regulate or control such acquisition and ownership? As the question of power lies at the root of the case,

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I come at once to consider that subject. Before doing so, however, in order to avoid being misled by false or irrelevant issues, it is essential to briefly consider two questions of fact. It is said, first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner of the stock in the railroads, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads; second, that as the two railroads were both over-capitalized, stock in them furnished no sufficient consideration for the issue of the stock of the Northern Securities Company. It would suffice to point out, *a*, that the proof shows that nearly nine million dollars were paid by the Securities Company for a portion of the stock acquired by it, and that, moreover, nearly thirty-five million dollars were expended by the Securities Company in the purchase of bonds of the Northern Pacific Company, which have been converted by the Securities Company into the stock of that railroad, [367] which the Securities Company now holds; and, *b*, that the market value of the railroad stocks is, moreover, indisputably shown by the proof to have been equal to the value fixed on them for the purpose of the exchange or purchase of such stock by the Northern Securities Company. Be this as it may, it is manifest that these considerations can have no possible influence on the question of the power of Congress in the premises; and therefore the suggestions can serve only to obscure the controversy. If the power was in Congress to legislate on the subject it becomes wholly immaterial what was the nature of the consideration paid by the company for the stock by it acquired and held if such acquisition and ownership, even if real, violated the act of Congress. If on the contrary the authority of Congress could not embrace the right of the Northern Securities Company to acquire and own the stock, the question of what consideration the Northern Securities Company paid for the stock or the method by which it was transferred must necessarily be beyond the scope of the act of Congress.

In testing the power of Congress I shall proceed upon the assumption that the act of Congress forbids the acquisition of

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a majority of the stock of two competing railroads engaged in part in interstate commerce by a corporation or any combination of persons.

The authority of Congress, it is conceded by all, must rest upon the power delegated by the eighth section of the first article of the Constitution, "to regulate Commerce with foreign Nations, and among the several States and with the Indian tribes." The proposition upon which the case for the government depends then is that the ownership of stock in railroad corporations created by a State is interstate commerce, wherever the railroads engage in interstate commerce.

At the outset, the absolute correctness is admitted of the declaration of Mr. Chief Justice Marshall in *Gibbons v. Ogden*, that the power of Congress to regulate commerce among the [368] States and with foreign nations "is complete in itself and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional."

The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such commerce which flows from the authority conferred by the Constitution, is thus conceded. But the concessions thus made do not concern the question in this case, which is not the scope of the power of Congress to regulate commerce, but whether the power extends to regulate the ownership of stock in railroads, which is not commerce at all. The confusion which results from failing to observe this distinction will appear from an accurate analysis of *Gibbons v. Ogden*, for in that case the great Chief Justice was careful to define the commerce, the power to regulate which was conferred upon Congress, and in the passages which I have previously quoted, simply pointed out the rule by which it was to be determined in any case whether Con-

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gress, in acting upon the subject, had gone beyond the limits of the power to regulate commerce as it was defined in the opinion. Accepting the test announced in *Gibbons v. Ogden* for determining whether a given exercise of the power to regulate commerce has in effect transcended the limits of regulation, it is essential to accept also the luminous definition of commerce announced in that case and approved so many times since, and hence to test the question for decision by that definition. The definition is this: "Commerce undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, *and is regulated [369] by prescribing rules for carrying on that intercourse.*" (Italics mine.)

Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in state corporations, because such corporations may be in part engaged in interstate commerce? Certainly not, if such question is to be governed by the definition of commerce just quoted from *Gibbons v. Ogden*. Let me analyze the definition. "Commerce undoubtedly is traffic, but it is something more, it is intercourse;" that is, traffic between the States and intercourse between the States. I think the ownership of stock in a state corporation cannot be said to be in any sense traffic between the States or intercourse between them. The definition continues: "It describes the commercial intercourse between nations and parts of nations." Can the ownership of stock in a state corporation, by the most latitudinarian construction, be embraced by the words "commercial intercourse between nations and parts of nations?" And to remove all doubt, the definition points out the meaning of the delegation of power to regulate, since it says that it is to be "regulated by prescribing rules for carrying on that intercourse." Can it in reason be maintained that to prescribe rules governing the ownership of stock within a State in a corporation created by it is within the power to prescribe rules for the regulation of intercourse between citizens of different States?

But if the question be looked at with reference to the powers of the Federal and state governments, the general nature

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of the one and the local character of the other, which it was the purpose of the Constitution to create and perpetuate, it seems to me evident that the contention that the authority of the National Government under the commerce clause gives the right to Congress to regulate the ownership of stock in railroads chartered by state authority, is absolutely destructive of the Tenth Amendment to the Constitution, which provides that "the powers not delegated to the United States by the Consti- [370] tution, nor prohibited by it to the States, are reserved to the States respectively or to the people." This must follow, since the authority of Congress to regulate on the subject can in reason alone rest upon the proposition that its power over commerce embraces the right to control the ownership of railroads doing in part an interstate commerce business. But power to control the ownership of all such railroads would necessarily embrace their organization. Hence it would result that it would be in the power of Congress to abrogate every such railroad charter granted by the States from the beginning if Congress deemed that the rights conferred by such state charters tended to restrain commerce between the States or to create a monopoly concerning the same.

Besides, if the principle be acceded to, it must in reason be held to embrace every consolidation of state railroads which may do in part an interstate commerce business, even although such consolidation may have been expressly authorized by the laws of the States creating the corporations.

It would likewise overthrow every state law forbidding such consolidations, for if the ownership of stock in state corporations be within the regulating power of Congress under the commerce clause and can be prohibited by Congress, it would be within the power of that body to permit that which it had the right to prohibit.

But the principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership, if allowed to continue, may restrain commerce between the States or create a monopoly thereof, is in my opinion in conflict with the most elementary conceptions of rights of property. For it would follow if Congress deemed

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that the acquisition by one or more individuals engaged in interstate commerce of more than a certain amount of property would be prejudicial to interstate commerce, the amount of property held or the amount which could be employed in interstate commerce could be regulated.

[371] In the argument at bar many of the consequences above indicated as necessarily resulting from the contention made were frankly admitted, since it was conceded that, even although the holding of the stock in the two railroads by the Northern Securities Company which is here assailed, was expressly authorized by the laws of both the States by which the railroad corporations were created, as it was by the law of the State of New Jersey, nevertheless as such authority, if exerted by the States, would be a regulation of interstate commerce, it would be repugnant to the Constitution as an attempt on the part of the States to interfere with the paramount authority of Congress on that subject. True, this assertion, made in the oral argument, in the printed argument is qualified by an intimation that the rule would not apply to state action taken before the adoption of the Anti-Trust Act, since up to that time, in consequence of the inaction of Congress on the subject, the States were free to legislate as they pleased regarding the matter. But this suggestion is without foundation to rest on. It has long since been determined by this court that where a particular subject matter is national in its character and requires uniform regulation, the absence of legislation by Congress on the subject indicates the will of Congress that the subject should be free from state control. *County of Mobile v. Kimball*, 102 U. S. 691; *Robbins v. Shelby Taxing District*, 120 U. S. 489, 493; *United States v. E. C. Knight Company*, 156 U. S. 1.

It is said, moreover, that the decision of this case does not involve the consequences above pointed out, since the only issue in this case is the right of the Northern Securities Company to acquire and own the stock. The right of that company to do so, it is argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, an entirely different thing. My mind fails to seize

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the distinction. The only premise by which the power of Congress can be extended to the subject matter of the right of the Securities Company to own the stock must be the proposition that such [372] ownership is within the legislative power of Congress, and if that proposition be admitted it is not perceived by what process of reasoning the power of Congress over the subject matter of ownership is to be limited to ownership by particular classes of corporations or persons. If the power embraces ownership, then the authority of Congress over all ownership which in its judgment may affect interstate commerce necessarily exists. In other words the logical result of the asserted distinction amounts to one of two things. Either that nothing is decided or that a decree is to be entered having no foundation upon which to rest. This is said because if the control of the ownership of stock in competing roads by one and the same corporation is within the power of Congress, and creates a restraint of trade or monopoly forbidden by Congress, it is not conceivable to me how exactly similar ownership by one or more individuals would not create the same restraint or monopoly, and be equally within the prohibition which it is decided Congress has imposed. Besides the incongruity of the conclusion resulting from the alleged distinction, to admit it would do violence to both the letter and spirit of the Constitution, since it would in effect hold that, although a particular act was a burden upon interstate commerce or a monopoly thereof, individuals could lawfully do the act, provided only they did not use the instrumentality of a corporation. But this court long since declared that the power to regulate commerce, conferred upon Congress, was "general and includes alike commerce by individuals, partnerships, associations and corporations." *Paul v. Virginia*, 8 Wall. 168, 183.

Indeed, the natural reluctance of the mind to follow an erroneous principle to its necessary conclusion, and thus to give effect to a grievous wrong arising from the erroneous principle, is an admonition that the principle itself is wrong. That admonition, I submit, is conclusively afforded by the decree which is now affirmed. Without stopping to point out what seems to me to be the conclusion, contradiction and denial of rights of property which the decree exemplifies,

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let me see [373] if in effect it is not at war with itself and in conflict with the principle upon which it is assumed to be based.

Fundamentally considered, the evil sought to be remedied is the restraint of interstate commerce and the monopoly thereof, alleged to have been brought about, through the acquisition by Mr. Morgan and Mr. Hill and their friends and associates, of a controlling interest in the stock of both the roads. And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, authorizes its return to the alleged conspirators, and does not restrain them from exercising the control resulting from the ownership. If the conspiracy and combination existed and was illegal, my mind fails to perceive why it should be left to produce its full force and effect in the hands of the individuals by whom it was charged the conspiracy was entered into.

It may, however, be said that even if the results which I have indicated be held necessarily to arise from the principles contended for by the government, it does not follow that such power would ever be exerted by Congress, or, if exerted, would be enforced to the detriment of charters granted by the States to railroads or consolidations thereof, effected under state authority, or the ownership of stock in such railroads by individuals, or the rights of individuals to acquire property by purchase, lease or otherwise, and to make any and all contracts concerning property which may thereafter become the subject matter of interstate commerce. The first suggestion is at once met by the consideration that it has been decided by this court that, as the Anti-Trust Act forbids any restraint, it therefore embraces even reasonable contracts or agreements. If, then, the ownership of the stock of the two railroads by the Northern Securities Company is repugnant to the act it follows that ownership, whether by the individual or another corporation, would be equally within the prohibitions of the act. As to the second, true it is that by the terms of the Anti-Trust Act the power to put its provisions in motion is, as to many particulars, confided to the highest law officer of the govern- [374] ment, and if that officer did not invoke the aid of the courts to

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restrain the rights of the railroads previously chartered by the States to enjoy the benefits conferred upon them by state legislation, or to prevent individuals from exercising their right of ownership and contract, the law in these respects would remain a dead letter. But to indulge in this assumption would be but to say that the law would not be enforced by the highest law officer of the government, a conclusion which, of course, could not be indulged in for a moment. In any view, such suggestion but involves the proposition that vast rights of property, instead of resting upon constitutional and legal sanction, must alone depend upon whether an executive officer might elect to enforce the law—a conclusion repugnant to every principle of liberty and justice.

Having thus by the light of reason sought to show the unsoundness of the proposition that the power of Congress to regulate commerce extends to controlling the acquisition and ownership of stock in state corporations, railroad or otherwise, because they may be doing an interstate commerce business, or to the consolidation of such companies under the sanction of state legislation, or to the right of the citizen to enjoy his freedom of contract and ownership, let me now endeavor to show, by a review of the practices of the governments, both state and national, from the beginning and the adjudications of this court, how wanting in merit is the proposition contended for. It may not be doubted that from the foundation of the government, at all events to the time of the adoption of the Anti-Trust Act of 1890, there was an entire absence of any legislation by Congress even suggesting that it was deemed by any one that power was possessed by Congress to control the ownership of stock in railroad or other corporations, because such corporations engaged in interstate commerce. On the contrary, when Congress came to exert its authority to regulate interstate commerce as carried on by railroads, manifested by the adoption of the interstate commerce act, 24 Stat. 379, it sedulously confined the provisions of that act to the [375] carrying on of interstate commerce itself, including the reasonableness of the rates to be charged for carrying on such commerce and other matters undeniably concerning the fact of interstate commerce. The same conception was manifested subsequently

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in legislation concerning safety appliances to be used by railroads, since the provisions of the act were confined to such appliances when actually employed in the business of interstate commerce. 27 Stat. 531. It also may not be doubted that from the beginning the various States of the Union have treated the incorporation and organization of railroad companies and the ownership of stock therein as matters within their exclusive authority. Under this conception of power in the States, universally prevailing and always acted upon, the entire railroad system of the United States has been built up. Charters, leases and consolidations under the sanction of state laws lie at the basis of that enormous sum of property and those vast interests represented by the railroads of the United States. Extracts from the reports of the Interstate Commerce Commission and from a standard authority on the subject, which were received in evidence, demonstrate that in effect nearly every great railroad system in the United States is the result of the consolidation and unification of various roads, often competitive, such consolidation or unification of management having been brought about in every conceivable form, sometimes by lease under state authority, sometimes by such leases made where there was no prohibition against them, and by stock acquisitions made by persons or corporations in order to acquire a controlling interest in both roads. Without stopping to recite details on the subject, I content myself with merely mentioning a few of the instances where great systems of railroad have been formed by the unification of the management of competitive roads, by consolidation or otherwise, often by statutory authority. These instances embrace the Boston and Maine system, the New York, New Haven and Hartford, the New York Central, the Reading, and the Pennsylvania systems. [376] One of the illustrations—as to the New York Central system—is the case of the Hudson River Railroad on one side of the Hudson River and the West Shore Railroad on the other, both parallel roads and directly competitive, and both united in one management by authority of a legislative act. It is indeed remarkable, if the whole subject was within the paramount power of Congress and not within the authority of the States, that

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there should have been a universal understanding to the contrary from the beginning. When it is borne in mind that such universal action related to interests of the most vital character, involving property of enormous amount concerning the welfare of the whole people, it is impossible in reason to deny the soundness of the assumption that it was the universal conviction that the States, and not Congress, had control of the subject matter of the organization and ownership of railroads created by the States. And the same inference is applicable to the condition of things which has existed since the adoption of the Anti-Trust Act in 1890. Who can deny that from that date to this consolidations and unification of management, by means of leases, stock ownership by individuals or corporations, have been carried on, when not prohibited by state laws, to a vast extent, and that during all this time, despite the energy of the government in invoking the Anti-Trust Law, that no assertion of power in Congress under that act to control the ownership of stock was ever knowingly made until first asserted in this cause. Quite recently Congress has amended the interstate commerce act by provisions deemed essential to make its prohibitions more practically operative, and yet no one of such provisions lends itself even to the inference that it was deemed by any one that the power of Congress extended to the control of stock ownership. Certainly the States have not so considered it. As a matter of public history it is to be observed that not long since, by authority of the legislature of the State of Massachusetts, a controlling interest by lease of the Boston and Albany road passed to the New York Central system.

[377] The decisions of this court to my mind leave no room for doubt on the subject. As I have already shown, the very definition of the power to regulate commerce, as announced in *Gibbons v. Ogden*, excludes the conception that it extends to stock ownership. I shall not stop to review a multitude of decisions of this court concerning interstate commerce, which, whilst upholding the paramount authority of Congress over that subject, at the same time treated it as elementary, that the effect of the power over commerce between the States was not to deprive the States of their right to legislate con-

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cerning the ownership of property of every character or to create railroad corporations and to endow them with such powers as were deemed appropriate, or to deprive the individual of his freedom to acquire, own and enjoy property by descent, contract or otherwise, because railroads or other property might become the subject of interstate commerce.

In *Paul v. Virginia*, 8 Wall. 168, the question was as to the power of the State of Virginia to license a foreign insurance company, and one of the contentions considered was whether the contract of insurance, since it was related to commerce, was within the regulating power of Congress and not of the State of Virginia. The proposition was disposed of in the following language (p. 183) :

"Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled [378] in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

In other words, the court plainly pointed out the distinction between interstate commerce as such and the contracts concerning, or the ownership of property which might become the subjects of interstate commerce. And the authority of *Paul v. Virginia* has been repeatedly approved in subsequent cases, which are so familiar as not to require citation.

In *Railroad Co. v. Maryland*, 21 Wall. 456, the question was this: The State of Maryland had chartered the Baltimore and Ohio Railroad Company, and in the charter had imposed upon it the duty of paying to the State a certain proportion of all its receipts from freight, which applied as well to interstate as domestic freight. The argument was that these provisions were repugnant to the commerce clause, because they necessarily increased the sum which the railroad would have

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to charge, and thereby constituted a regulation of commerce. The court held the law not to be repugnant to the Constitution, and in the course of the opinion said (p. 473) :

"In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts."

True it is that some of the expressions used in the opinion in the case just cited, giving rise to the inference that there was power in the State to regulate the rates of freight on interstate commerce, may be considered as having been overruled by *Wabash Railroad Company v. Illinois*, 118 U. S. 557. But that case also in the fullest manner pointed out the fact that the power to regulate commerce, conferred on Congress by the [379] Constitution, related not to the mere ownership of property or to contracts concerning property, because such property might subsequently be used in interstate commerce or become the subject of it. For instance, the definition given of interstate commerce in *Gibbons v. Ogden*, previously referred to, was reiterated and in addition the definition expounded in *County of Mobile v. Kimball*, 102 U. S. 691, was approvingly quoted. That definition was as follows (p. 574) :

"Commerce with foreign countries and among the States, strictly construed, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce."

In *Ashley v. Ryan*, 153 U. S. 436, this was the question: The property of various railroad corporations operating in the States of Ohio, Michigan, Indiana, Illinois and Missouri had been sold under decrees of foreclosure. The purchasers of the respective lines availed themselves of the Ohio statutes, and consolidated all the corporations into one so as to form a single system, the Wabash. On presenting the articles of consolidation to the Secretary of State of Ohio, that officer demanded a fee imposed by the Ohio statutes, predicated upon the sum total of the capital stock of the consolidated

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company. This was refused on the ground that the State of Ohio had no right to make the charge, and that its doing so was repugnant to the commerce clause of the Constitution of the United States and to the Fourteenth Amendment. This court decided against this contention. It held that, as the right to consolidate could [380] alone arise from the Ohio law, the corporation could not avail of that law and avoid the condition which the law imposed. Speaking of the consolidation, the court said (p. 440) :

"The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured."

And, after a copious review of the authorities concerning the power of the State over the consolidation, the case was summed up by the court in the following passage (p. 446) :

"Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, *the right to which depended solely on the will of that State*," (italics mine,) "and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

How a right which was thus decided to depend *solely* upon the authority of the States can now be said to depend solely upon the will of Congress, I do not perceive.

In *United States v. E. C. Knight Co.*, 156 U. S. 1, the facts and the relief based on them were thus stated by Mr. Chief Justice Fuller, delivering the opinion of the court (p. 9) :

"By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890."

[381] After referring, in a general way, to what constituted a monopoly or restraint of trade at common law, the question for decision was thus stated (p. 11) :

"The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill."

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Examining this question as to the power of Congress, it was observed (p. 11) :

"It cannot be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

Next, pointing out that the power of Congress over interstate commerce and the fact that its failure to legislate over subjects requiring uniform legislation expressed the will of Congress that the State should be without power to act on that subject, the court came to consider whether the power of Congress to regulate commerce embraced the authority to regulate and control the ownership of stock in the state sugar refining companies, because the products of such companies when manufactured might become the subject of interstate commerce. Elaborately passing upon that question and reaffirming the definition of Chief Justice Marshall of commerce, in the constitutional sense, it was held that, whilst the power of Congress extended to commerce as thus defined, it did not embrace the ownership of stock in state corporations, because the products of such manufacture might subsequently become the subject of interstate commerce.

The parallel between the two cases is complete. The one corporation acquired the stock of other and competing corporations by exchange for its own. It was conceded, for the [382] purposes of the case, that in doing so monopoly had been brought about in the refining of sugar, that the sugar to be produced was likely to become the subject of interstate commerce, and indeed that part of it would certainly become so. But the power of Congress was decided not to extend to the subject, because the ownership of the stock in the corporations was not itself commerce.

In *Pearsall v. The Great Northern Railway Company*, 161 U. S. 646, the question was whether the acquisition by the Great Northern road of a controlling interest in the stock of the Northern Pacific Railway Company was a violation of a Minnesota statute prohibiting the consolidation of competing lines. It is at once evident that if the subject of consolidation

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was within the authority of Congress, as Congress had not expressed its will upon the subject, the act of the legislature of Minnesota was void because repugnant to the Constitution of the United States. But the possibility of such a contention was not thought of by either party to the cause or by the court itself. Treating the power of the State as undoubted, the court, speaking through Mr. Justice Brown, decided that the Minnesota law should be enforced. It was pointed out in the opinion that, as the charter was one granted by the State, the railroad company and the ownership of stock therein was subject to the state law, and this was made the basis of the decision. Whilst, however, resting its conclusion upon the power of the State over the corporation by it created, the court was careful to recognize that the authority in the State was so complete, as the company was a state corporation, that the State had the right, *if it chose to do so, to authorize the consolidation, even although the lines were competing.*

In *Louisville & Nashville Railroad v. Kentucky*, 161 U. S. 677, the power of the State to pass a law forbidding the consolidation of competing state railroad corporations doing in part an interstate commerce business was again considered, and a state statute in which the power was exercised was upheld. Here, again, it is to be observed that if the consolidation of [383] state railroad corporations, because they did in part an interstate commerce business, was within the paramount authority of Congress, that authority was exclusive and the state regulation which the court upheld was void. And this question, vital to the consideration of the case, and without passing upon which it could not have been decided did not escape observation, since it was explicitly pressed upon the court and was directly determined. The court, speaking through Mr. Justice Brown, said (pp. 701, 702) :

"But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways.

* * * * *

"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority,

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and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

How one case could be more completely decisive of another than the ruling in the case just quoted is of this, I am unable to perceive.

[384] The subject was considered at circuit in *In re Greene*, 52 Fed. Rep. 104. The case was this: A person was indicated in one State for creating a monopoly in violation of the Anti-Trust Act of Congress and was held in another State for extradition. The writ of *habeas corpus* was invoked, upon the contention that the face of the indictment did not state an offense against the United States, since the matters charged did not involve interstate commerce. The case is referred to, although it arose at circuit and was determined before the decisions of this court in the *Pearsall* and *Louisville and Nashville* cases, because it was decided by Mr. Justice Jackson, then a Circuit Judge, who subsequently, became a member of this court. The opinion manifests that the case was considered by Judge Jackson with that care which was his conceded characteristic and was stated by him with that lucidity which was his wont. In discharging the accused on the grounds stated in the application for the writ, Judge Jackson said (p. 112):

"Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the [385] subject of trade or commerce among the several States or

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with foreign nations. Commerce among the States, within the exclusive regulating power of Congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' *County of Mobile v. Kimball*, 102 U. S. 691, 702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203. In the application of this comprehensive definition, it is settled by the decision of the Supreme Court that such commerce includes, not only the actual transportation of commodities and persons between the States, but also the instrumentalities and processes of such transportation.

* * * * *

"That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another State, constitutes that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one State to another, and the mingling or merging thereof in the general mass of property in the State of destination, the sale, distribution and consumption thereof in the latter State forms no part of interstate commerce."

If this opinion had been written in the case now considered it could not more completely than its reasoning does have disposed of the contention that the ownership of stock by a corporation in competing railroads was commerce.

United States v. Freight Association, 166 U. S. 290, was this: A large number of railway companies, who were made defendants in the cause, had formed themselves into an association, known as the Trans-Missouri Freight Association, and the companies had bound themselves by the provisions contained in the articles of agreement. Many stipulations relating to [386] the carrying on of interstate commerce over the roads which were parties to the agreement were contained in it, and section 3 provided as follows:

"A committee shall be appointed to establish rates, rules and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties hereto; and if they disagree it shall be arbitrated in the manner provided in article VII."

The government sought to dissolve the association on the ground that the agreement restrained commerce between the States, and therefore was in violation of the Anti-Trust Act. On the hearing in this court, as the agreement directly related in many particulars to interstate transportation and the charge, to be made therefor, it was conceded on all hands that

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it embraced subjects which came within the power of Congress to regulate commerce. The contentions on behalf of the association were these: First. That the movement of interstate commerce by railroads was not within the Anti-Trust Act, since Congress had regulated that subject by the interstate commerce act, and did not intend to amplify its provisions in any respect by the subsequent enactment of the Anti-Trust Law. Second. That even if this were not the case, and the movement of interstate commerce by railroads was affected by the Anti-Trust Statute, the particular agreement in question did not violate the act, because the agreement did not unreasonably restrain interstate commerce. Both these contentions were decided against the association, the court holding that the Anti-Trust Act did embrace interstate carriage by railroad corporations, and as that act prohibited any contract in restraint of interstate commerce, it hence embraced all contracts of that character, whether they were reasonable or unreasonable.

The same subject was considered in a subsequent case, [387] *United States v. Joint Traffic Association*, 171 U. S. 505. In that case also there was no question that the agreement between the railroads related to the movement of interstate commerce, but it was insisted that the particular agreement there involved did not seek to fix rates, but only to secure the continuation of just rates which had already been fixed, and hence was not within the Anti-Trust Law. If this were held not to be true, a reconsideration of the questions decided in the *Freight Association* case was invoked. The court reviewed and reiterated the rulings made in the *Freight Association* case and held that the particular agreement in question came within them.

I mention these two last cases not because they are apposite to the case in hand, for they are not, since the contracts which were involved in them confessedly concerned interstate commerce, whilst in this case the sole question is whether the ownership of stock in competing railroads does involve interstate commerce. The cases are referred to in connection with the decisions previously cited, because, taken together, they illustrate the distinction which this court has always maintained between the power of Congress over interstate com-

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merce and its want of authority to regulate subjects not embraced within that grant. The same distinction is aptly shown in subsequent cases.

Hopkins v. United States, 171 U. S. 578, involved whether a particular agreement entered into between persons carrying on the business of selling cattle on commission, exclusively at the Kansas City stock yards was valid. At those yards cattle were received in vast numbers through the channels of interstate commerce, and from thence were distributed through such channels. For these reasons the business of those engaged exclusively in the sale of cattle on the stock yards was asserted to be interstate commerce and within the power of Congress to regulate. In the opinion of the court, delivered by Mr. Justice Peckham, it was at the outset said (p. 586):

"The relief sought in this case is based exclusively on the [388] act of Congress approved July 2, 1890, c. 647, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' commonly spoken of as the Anti-Trust Act. 26 Stat. 209.

"The act has reference only to that trade or commerce which exists, or may exist, among the several States or with foreign nations, and has no application whatever to any other trade or commerce.

"The question meeting us at the threshold, therefore, in this case is, what is the nature of the business of the defendants, and are the by-laws, or any subdivision of them above referred to, in their direct effect in restraint of trade or commerce among the several States or with foreign nations; or does the case made by the bill and answer show that any one of the above defendants has monopolized, or attempted to monopolize, or combined or conspired with other persons to monopolize, any part of the trade or commerce among the several States or with foreign nations?"

Proceeding, then, to consider the agreement, it was pointed out that the contention that the sale of cattle on the stock yards constituted interstate commerce was without merit. The distinction between interstate commerce as such and the power to make contracts and to buy and sell property was clearly stated, and because of that distinction the agreement was held not to be within the act of Congress, because that act could and did only relate to interstate commerce.

And on the day the decision just referred to was announced another case under the Anti-Trust Act was decided. *Anderson v. United States*, 171 U. S. 604. The difference between that case and the *Hopkins* case was thus stated by Mr. Justice Peckham, in delivering the opinion of the court (p. 612):

"This case differs from that of *Hopkins v. United States*, *supra*, in the fact that these defendants are themselves purchasers of cattle

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on the market, while the defendants in the *Hopkins* case were only commission merchants who sold the cattle upon commission as a compensation for their services.

[389] "Counsel for the Government assert that any agreement or combination among buyers of cattle coming from other States, of the nature of the by-laws in question, is an agreement or combination in restraint of interstate trade or commerce."

The court, however, said it did not deem it necessary to decide whether the fact that the merchants who entered into the agreement bought cattle in other States and shipped them to other States, caused their business to be interstate commerce, because in any event the court was of opinion that the agreement which was assailed, even if it involved interstate commerce, was not in violation of any of the provisions of the Anti-Trust Act.

The *Anderson* case was followed by *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211. The case involved deciding whether a particular combination of pipe manufacturers, looking to the control of the sale and transportation of such pipe over a large territory, embracing many States and a division of the territory between the members of the combination, was within the prohibitions of the Anti-Trust Act. Coming to consider the subject, the court, through Mr. Justice Peckham, analyzed the contract and pointed out its monopolistic features. In answer to the argument that the matter complained of was not commerce, because it related only to a sale of pipe, and therefore was within the rule announced in the *Knight* and *Hopkins* cases, the *Knight* case was approvingly reviewed, and its doctrine in effect was reaffirmed, the court observing (p. 240) :

"The direct purpose of the combination in the *Knight* case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured articles; nothing looking to a transaction in the nature of interstate commerce.

* * * * *
 "We think the case now before us involves contracts of the nature last before mentioned, not incidentally or collaterally, [390] but as a direct and immediate result of the combination engaged in by defendants. * * * * * *The defendants by reason of this combination and agreement could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the terms and pursuant to the provisions of such combination.* As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?" (Italics mine.)

Having thus found that the agreement concerned interstate commerce, because it directly purported to control the

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movement of goods from one State to the other, and besides sought to prohibit that movement or restrict the same to particular individuals, it was held that the contract was, for these reasons, within the prohibitions of the Act of Congress, and was therefore void. I do not pause to consider the case of *Montague & Co. v. Lowry*, 193 U. S. 38, decided at this term, since on the face of the opinion it is patent that the contract directly concerned the shipment of goods from one State to another, and this was the sole and exclusive basis of the decision.

Now, it is submitted, that the decided cases just reviewed demonstrate that the acquisition and ownership of stock in competing railroads, organized under state law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress. It is, indeed, suggested that the cases establish a contrary doctrine. This is sought to be demonstrated by quoting passages from the opinions separated from their context apart from the questions which the cases involved. But as the issues which were decided in the *Knight*, in the *Pearsall*, in the *Louisville and Nashville* case and in the *Hopkins* case directly exclude the significance attributed to the passages from the opinions in those cases relied upon, it must follow that if such passages could, when separated from their context, have the meaning attributed to them the expressions would be mere *obiter*. And this consideration renders it unnecessary for me to analyze the passages to show that when they are read in connection with their con- [391] text they have not the meaning now sought to be attached to them. But other considerations equally render it unnecessary to particularly review the sentences relied upon. There can be no doubt that it was expressly decided in the *Knight* case that the acquisition of stock by one corporation in other corporations so as to control them all was not interstate commerce, *although the goods of the manufacturing companies whose stock was acquired might become the subject of interstate commerce*. If then the passage from the *Knight* case could be given the meaning sought to be affixed to it, the result would be but to say that that case overruled itself. And

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this would be the result in the *Pearsall* case, since in that case it was decided that the States had the power to forbid the consolidation of competing railroads, even by means of the acquisition of stock. Besides, as in the *Louisville and Nashville* case, immediately following the *Pearsall*, it was expressly decided that the interstate commerce power of Congress did not embrace such consolidation, and Congress, therefore, could not restrain a State from either forbidding or permitting it to take place, it would follow that if the sentences in the *Pearsall* case had the import now applied to them, that that case not only overruled itself, but was besides overruled by the *Louisville and Nashville* case, and this although the two cases were decided on the same day, the opinions in both cases having been delivered by the same Justice.

The same confusion and contradiction arises from separating from their context and citing as applicable to this case passages from the opinions in the *Freight Association* and *Joint Traffic* cases. Those cases, as I have previously stated, related exclusively to a contract admittedly involving interstate commerce, and it was decided that any restraint of such commerce was forbidden by the Anti-Trust Act. Now in the *Hopkins* case, decided subsequent to the *Freight Association* and *Joint Traffic* cases, the contract considered unquestionably involved a restraint, but, as such restraint did not concern interstate commerce, it was held not to come within the power of Congress. [392] It would follow then, if the sentence quoted from the opinions in the *Freight Association* and *Joint Traffic* cases, which cases concerned only that which was completely interstate commerce, applied to that which was not such commerce, that the *Hopkins* case overruled both these cases, although the opinions in all of the cases were delivered by the same Justice, and no intimation was suggested of such overruling. It would also result that, after having overruled those cases in the *Hopkins* case, the court, in expressing its opinion through the same Justice, proceeded in the *Addyston Pipe* case, which related only to interstate commerce, to overrule the *Hopkins* case and reaffirm the prior cases.

Of course, in my opinion, there is no ground for holding

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that the decided cases embody such extreme contradictions or produce such utter confusion. The cases are all consistent, if only the elementary distinction upon which they proceeded be not obscured, that is, the difference which arises from the power of Congress to regulate interstate commerce on the one hand, and its want of authority on the other, to regulate that which is not interstate commerce. Indeed, the confounding and treating as one, things which are wholly different, is the error permeating all the contentions for the Government.

What has been previously said suffices to show the reasons which control my judgment, and I might well say nothing more. There were, however, three propositions so earnestly pressed by the Government at bar upon the theory that they demonstrate that common ownership of a majority of the stock of competing railroads is subject to the regulating power of Congress that I propose to briefly give the reasons which cause me to conclude that the contentions relied upon are without merit.

1. This court, it is urged, has frequently declared that the power of Congress over interstate commerce includes the authority to regulate the instrumentalities of such commerce, and the following cases are cited: *Railroad Co. v. Fuller*, 17 Wall. 560; *Welton v. Missouri*, 91 U. S. 275; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. To these cases might be added many others, including some of those which have been previously referred to by me. The argument now made is, as the power extends to instrumentalities, and railroads are such instrumentalities, therefore the acquisition and ownership of railroads, by persons or corporations, is commerce and subject to the power of Congress to regulate. But this involves a *non sequitur*, and a confusion of thought arising from again confounding as one, things which are wholly different. True, the instrumentalities of interstate commerce are subject to the power to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and

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ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise. The same distinction exists between the two which obtains between the power of Congress to regulate the movement of property in the channels of interstate commerce and its want of authority to regulate the acquisition and ownership of the same property. This difference was pointed out in the cases which have been referred to, and the distinction between the two has been from the beginning the dividing line, demarking the power of the national government on the one hand and of the States on the other. All the rights of ownership in railroads belonging to corporations organized under state law, the power to acquire the same, to mortgage, to foreclose mortgages, to lease, and the contract relations concerning them, have from the foundation had their sanction in the legislation of the several States. One may search in vain in the acts of Congress for any legislation even suggesting that the power over these subjects was deemed to be in Congress. On the contrary, the legislation of Congress concerning the instrumentalities of railroads under the interstate commerce power clearly refutes the contention, since that legislation relates only to such instrumentalities [394] during their actual use in interstate commerce and not otherwise. How, consistently with the proposition, can the great number of cases be explained which in both the Federal and state courts have dealt with the ownership of railroads and their instrumentalities by foreclosure and otherwise, under the assumption that the rights of the parties were controlled by state laws governing the subject? And here again it would follow, if the proposition was adopted, that all the vast body of state legislation on the subject would be void from the beginning and the enormous sum of property rights depending upon such legislation would be impaired and lost, since if the subject were within the power of Congress it was one requiring a uniform regulation, and therefore the inaction of Congress would signify an entire want of power in the States over the subjects.

2. The court, it is urged, has in a number of cases declared that the several States were without power to directly burden interstate commerce. The acquiring and ownership by one

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person or corporation of a majority of the stock in competing railroads engaged in interstate commerce, it is argued, being a direct burden, therefore power to regulate the subject is in Congress and not in the States. Undoubtedly not only in the decisions referred to but in many others, including most of those which have been by me quoted, the absolute want of power in the States to legislate concerning interstate commerce or to burden it directly has been declared, and the doctrine in its fullest scope is too elementary to require citation of authority. But to decide this case upon the assumption that the acquisition and ownership of stock in competing railroads engaged in interstate commerce is a regulation of commerce, or, what is the same thing, a direct burden on it, would be but to assume the question arising for decision.

Where an authority is exerted by a State which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities, and can only have an effect upon such commerce by reason of the reflex and remote results [395] of the exertion of the lawful power, it cannot be said, without a contradiction in terms, that the power exercised is a regulation, because a direct burden upon commerce. *To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the States if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce.* The question whether a burden is direct and therefore constitutes a regulation of interstate commerce is to be determined by ascertaining whether the power exerted is lawful, generally speaking, and then by finding whether its exercise in the particular case was such as to cause it to be illegal, because directly burdening interstate commerce. If in a given case the power be lawful and the mode in which it is exercised be not such as to directly burden, there is no regulation of commerce, although as an indirect result of the exertion of the lawful power some effect may be produced upon commerce. In other words, where the power is lawful but it is asserted that it has been so exerted as to amount to a direct burden, *there must be, so to speak, a privity between the manifestation of the power and the resulting burden.* The distinction is well illustrated

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by the cases which have been referred to, and was very lucidly pointed out by Judge Jackson in the Greene case. Take the Knight case. There as the contract merely concerned the purchase of stock in the refineries, and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held as the right to acquire was not within the commerce clause, the fact that the owners of the manufactured product might thereafter so act concerning the product as to burden commerce, there was no direct burden resulting from the mere acquisition and ownership. On the contrary, in the Addyston Pipe case, after stating in the fullest way the paramount authority of Congress concerning commerce, the court approached the terms of the contract in order to determine whether it related to interstate commerce, and if it did, whether it created a direct burden. In doing so, as it [396] found that the contract both related to interstate commerce and directly burdened the same, the contract was held to be void. This case comes within the Knight case. It concerns the acquisition and ownership of stock. No contract is in question made by the owners of the stock controlling the railroads in the performance of their duties as carriers of interstate commerce. The sole contention is that as the result of the ownership of the stock there may arise, in the operation of the roads, a burden on interstate commerce. That is, that such burden may indirectly result from the acquisition and ownership. To maintain the contention, therefore, it must be decided that because ownership of property if acquired may be so used as to burden commerce, therefore to acquire and own is to burden. This, however, would be but to declare that that which was in its very nature and essence indirect is direct.

3. But, it is said, it may not be denied that the common ownership of stock in competing railroads endows the holders of the majority of the stock with a common interest in both railroads and with the authority, if they choose to exert it, to so unify the management of the roads as to suppress competition between them. This power, it is insisted, is within the regulating authority of Congress over interstate commerce. In other words, the contention broadly is that Congress has

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not only the authority to regulate the exercise of interstate commerce, but under that power has the right to regulate the ownership and possession of property, if the enjoyment of such rights would enable those who possessed them if they engaged in interstate commerce to exert a power over the same. But this proposition only asserts in another form that the right to acquire the stock was interstate commerce, and therefore was within the authority of Congress, and is refuted by the reasons and authorities already advanced. That the proposition, if adopted, would extend the power of Congress to all subjects essentially local, as already stated in considering the previous proposition, is to my mind manifest. So clearly is this the result of the particular proposition now being considered, that, [397] at the risk of repetition, I again illustrate the subject. Under this doctrine the sum of property to be acquired by individuals or by corporations, the contracts which they may make, would be within the regulating power of Congress. If it were judged by Congress that the farmer in sowing his crops should be limited to a certain production because overproduction would give power to affect commerce, Congress could regulate that subject. If the acquisition of a large amount of property by an individual was deemed by Congress to confer upon him the power to affect interstate commerce if he engaged in it, Congress could regulate that subject. If the wage-earner organized to better his condition and Congress believed that the existence of such organization would give power, if it were exerted, to affect interstate commerce, Congress could forbid the organization of all labor associations. Indeed, the doctrine must in reason lead to a concession of the right in Congress to regulate concerning the aptitude, the character and capacity of persons. If individuals were deemed by Congress to be possessed of such ability that participation in the management of two great competing railroad enterprises would endow them with the power to injuriously affect interstate commerce, Congress could forbid such participation. If the principle were adopted, and the power which would arise from so doing were exercised, the result would be not only to destroy the state and Federal governments, but by the implication of authority, from which the destruction would be brought

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about, there would be erected upon the ruins of both a government endowed with the arbitrary power to disregard the great guaranty of life, liberty and property and every other safeguard upon which organized civil society depends. I say the guaranty, because in my opinion the three are indissolubly united, and one cannot be destroyed without the other. Of course, to push propositions to the extreme to which they naturally lead is often an unsafe guide. But at the same time the conviction cannot be escaped by me that principles and conduct bear a relation one to the other, especially in matters of public concern. The fathers [398] founded our government upon an enduring basis of right, principle and of limitation of power. Destroy the principles and the limitations which they impose, and I am unable to say that conduct may not, when unrestrained, give rise to action doing violence to the great truths which the destroyed principles embodied.

The fallacy of all the contentions of the Government is, to my mind, illustrated by the summing up of the case for the Government made in the argument at bar. The right to acquire and own the stock of competing railroads involves, says that summing up, the power of an individual "*to do*" (italics mine) absolutely as he pleases with his own, whilst the claim of the Government is that the right of the owner of property "*to do*" (italics mine) as he pleases with his own may be controlled in the public interest by legitimate legislation. But the case involves the right to *acquire and own*, not the right "*to do*" (italics mine). Confusing the two gives rise to the errors which it has been my endeavor to point out. Undoubtedly the States possess power over corporations, created by them, to permit or forbid consolidation, whether accomplished by stock ownership or otherwise, to forbid one corporation from holding stock in another, and to impose on this or other subjects such regulations as may be deemed best. Generally speaking, however, the right to do these things springs alone from the fact that the corporation is created by the States, and holds its rights subject to the conditions attached to the grant, or to such regulations as the creator, the State, may lawfully impose upon its creature, the corporation. Moreover, irrespective of the relation of creator and crea-

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ture, it is, of course, true in a general sense that government possesses the authority to regulate, within certain just limits, what an owner *may do* with his property. But the first power which arises from the authority of a grantor to exact conditions in making a grant or to regulate the conduct of the grantee gives no sanction to the proposition that a government, irrespective of its power to grant, has the general authority to [399] limit the character and quantity of property which may be acquired and owned. And the second power, the general governmental one, to reasonably control the *use* of property, affords no foundation for the proposition that there exists in government a power to limit the quantity and character of property which may be acquired and owned. The difference between the two is that which exists between a free and constitutional government restrained by law and an absolute government unrestrained by any of the principles which are necessary for the perpetuation of society and the protection of life, liberty and property.

It cannot be denied that the sum of all just governmental power was enjoyed by the States and the people before the Constitution of the United States was formed. None of that power was abridged by that instrument except as restrained by constitutional safeguards, and hence none was lost by the adoption of the Constitution. The Constitution, whilst distributing the preëxisting authority, preserved it all. With the full power of the States over corporations created by them and with their authority in respect to local legislation, and with power in Congress over interstate commerce carried to its fullest degree. I cannot conceive that if these powers, admittedly possessed by both, be fully exerted a remedy cannot be provided fully adequate to suppress evils which may arise from combinations deemed to be injurious. This must be true unless it be concluded that by the effect of the mere distribution of power made by the Constitution partial impotency of governmental authority has resulted. But if this be conceded, *arguendo*, the Constitution itself has pointed out the method by which, if changes are needed, they may be brought about. No remedy, in my opinion, for any supposed or real infirmity can be afforded by disregarding the Con-

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stitution, by destroying the lines which separate state and Federal authority, and by implying the existence of a power which is repugnant to all those fundamental rights of life, liberty and property, upon which just government must rest.

[400] If, however, the question of the power of Congress be conceded, and the assumption as to the meaning of the Anti-Trust Act which has been indulged in for the purpose of considering that power be put out of view, it would yet remain to be determined whether the Anti-Trust Act embraced the acquisition and ownership of the stock in question by the Northern Securities Company. It is unnecessary for me, however, to state the reasons which have led me to the conclusion that the act, when properly interpreted, does not embrace the acquisition and ownership of such stock, since that subject is considered in an opinion of Mr. Justice Holmes, which explains the true interpretation of the statute, as it is understood by me, more clearly than I would be able to do.

Being of the opinion, for the reasons heretofore given, that Congress was without power to regulate the acquisition and ownership of the stock in question by the Northern Securities Company, and because I think even if there were such power in Congress, it has not been exercised by the Anti-Trust Act, as is shown in the opinion of Mr. Justice Holmes, I dissent.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE PECKHAM and MR. JUSTICE HOLMES, concur in this dissent.

MR. JUSTICE HOLMES, with whom concurred the CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE PECKHAM, dissenting.

I am unable to agree with the judgment of the majority of the court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feel-

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ings and distorts the judgment. These immediate interests [401] exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

The question to be decided is whether, under the act of July 2, 1890, c. 647, 26 Stat. 209, it is unlawful, at any stage of the process, if several men unite to form a corporation for the purpose of buying more than half the stock of each of two competing interstate railroad companies, if they form the corporation, and the corporation buys the stock. I will suppose further that every step is taken, from the beginning, with the single intent of ending competition between the companies. I make this addition not because it may not be and is not disputed but because, as I shall try to show, it is totally unimportant under any part of the statute with which we have to deal.

The statute of which we have to find the meaning is a criminal statute. The two sections on which the Government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one [402] of the other sort. I am no friend of artificial interpretations because a statute is of one

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kind rather than another, but all agree that before a statute is to be taken to punish that which always has been lawful it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail.

Again the statute is of a very sweeping and general character. It hits "every" contract or combination of the prohibited sort, great or small, and "every" person who shall monopolize or attempt to monopolize, in the sense of the act, "any part" of the trade or commerce among the several States. There is a natural inclination to assume that it was directed against certain great combinations and to read it in that light. It does not say so. On the contrary, it says "every," and "any part." Still less was it directed specially against railroads. There even was a reasonable doubt whether it included railroads until the point was decided by this court.

Finally, the statute must be construed in such a way as not merely to save its constitutionality but, so far as is consistent with a fair interpretation, not to raise grave doubts on that score. I assume, for the purposes of discussion, although it would be a great and serious step to take, that in some case that seemed to it to need heroic measures, Congress might regulate not only commerce, but instruments of commerce or contracts the bearing of which upon commerce would be only indirect. But it is clear that the mere fact of an indirect effect upon commerce not shown to be certain and very great, would not justify such a law. The point decided in *United States v. E. C. Knight Co.*, 156 U. S. 1, 17, was that "the fact that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the Government, which I do [403] not believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere.

This act is construed by the Government to affect the purchasers of shares in two railroad companies because of the

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effect it may have, or, if you like, is certain to have, upon the competition of these roads. If such a remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between the States that may not be made a crime by the finding of a jury or a court. The personal ascendancy of one man may be such that it would give to his advice the effect of a command, if he owned but a single share in each road. The tendency of his presence in the stockholders' meetings might be certain to prevent competition, and thus his advice, if not his mere existence, become a crime.

I state these general considerations as matters which I should have to take into account before I could agree to affirm the decree appealed from, but I do not need them for my own opinion, because when I read the act I cannot feel sufficient doubt as to the meaning of the words to need to fortify my conclusion by any generalities. Their meaning seems to me plain on their face.

The first section makes "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations" a misdemeanor, punishable by fine, imprisonment or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two—Contracts in restraint of trade and combinations or conspiracies in restraint of trade, and we have to consider what [404] these respectively are. Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business, (although in some cases carrying on a similar one,) which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was primarily on the contractor's own account. The notion of monopoly did

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not come in unless the contract covered the whole of England. *Mitchel v. Reynolds*, 1 P. Wms. 181. Of course this objection did not apply to partnerships or other forms, if there were any, of substituting a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade, or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm. See *United States v. E. C. Knight Co.*, 156 U. S. 1. All that is added to the first section by § 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the States; and that the liability is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of § 1 than it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man. That I am right in my interpretation [405] of the words of § 1 is shown by the words "in the form of trust or otherwise." The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. Further proof

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is to be found in § 7, giving an action to any person injured in his business or property by the forbidden conduct. This cannot refer to the parties to the agreement and plainly means that outsiders who are injured in their attempt to compete with a trust or other similar combination may recover for it. *Montague & Co. v. Lowry*, 193 U. S. 38. How effective the section may be or how far it goes, is not material to my point. My general summary of the two classes of cases which the act affects is confirmed by the title, which is "An Act to protect Trade and Commerce against unlawful Restraints and Monopolies."

What I now ask is under which of the foregoing classes this case is supposed to come, and that question must be answered as definitely and precisely as if we were dealing with the indictments which logically ought to follow this decision. The provision of the statute against contracts in restraint of trade has been held to apply to contracts between railroads, otherwise remaining independent, by which they restricted their respective freedom as to rates. This restriction by contract with a stranger to the contractor's business is the ground of the decision in *United States v. Joint Traffic Association*, 171 U. S. 505, following and affirming *United States v. Trans-Missouri Freight Association*, 166 U. S. 290. I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticise or abridge. But the provision has not been decided, and, it seems to me, could not be decided without perversion of plain language, to apply to an arrangement by which competition is ended through com- [406] munity of interest—an arrangement which leaves the parties without external restriction. That provision, taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the States shall not be cut down by contract with a stranger. So far as that phrase goes, it is lawful to abolish competition by any form of union. It would seem to me impossible to say that the words "every contract in restraint of trade is a crime punishable with imprisonment," would send the mem-

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bers of a partnership between, or a consolidation of, two trading corporations to prison—still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both. Yet those words would have that effect if this clause of § 1 applies to the defendants here. For it cannot be too carefully remembered that that clause applies to “every” contract of the forbidden kind—a consideration which was the turning point of the Trans-Missouri Freight Association’s case.

If the statute applies to this case it must be because the parties, or some of them, have formed, or because the Northern Securities Company is, a combination in restraint of trade among the States, or, what comes to the same thing in my opinion, because the defendants, or some or one of them, are monopolizing or attempting to monopolize some part of the commerce between the States. But the mere reading of those words shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two States it monopolizes a part of the trade among the States. Of course the statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that [407] the statute forbids a combination of men into a corporation to build and run such a railroad between the States.

I assume that the Minnesota charter of the Great Northern and the Wisconsin charter of the Northern Pacific both are valid. Suppose that, before either road was built, Minnesota, as part of a system of transportation between the States, had created a railroad company authorized singly to build all the lines in the States now actually built, owned or controlled by either of the two existing companies. I take it that that charter would have been just as good as the present one, even if the statutes which we are considering had been in force. In whatever sense it would have created a monopoly the pres-

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ent charter does. It would have been a large one, but the act of Congress makes no discrimination according to size. Size has nothing to do with the matter. A monopoly of "any part" of commerce among the States is unlawful. The supposed company would have owned lines that might have been competing—probably the present one does. But the act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end.

There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part. But my answer has been indicated already. In the first place size in the case of railroads is an inevitable incident and if it were an [408] objection under the act, the Great Northern and the Northern Pacific already were too great and encountered the law. In the next place in the case of railroads it is evident that the size of the combination is reached for other ends than those which would make them monopolies. The combinations are not formed for the purpose of excluding others from the field. Finally, even a small railroad will have the same tendency to exclude others from its narrow area that great ones have to exclude others from a greater one, and the statute attacks the small monopolies as well as the great. The very words of the act make such a distinction impossible in this case and it has not been attempted in express terms.

If the charter which I have imagined above would have

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been good notwithstanding the monopoly, in a popular sense, which it created, one next is led to ask whether and why a combination or consolidation of existing roads, although in actual competition, into one company of exactly the same powers and extent, would be any more obnoxious to the law. Although it was decided in *Louisville & Nashville Railroad Co. v. Kentucky*, 161 U. S. 677, 701, that since the statute, as before, the States have the power to regulate the matter, it was said, in the argument, that such a consolidation would be unlawful, and it seems to me that the Attorney General was compelled to say so in order to maintain his case. But I think that logic would not let him stop there, or short of denying the power of a State at the present time to authorize one company to construct and own two parallel lines that might compete. The monopoly would be the same as if the roads were consolidated after they had begun to compete—and it is on the footing of monopoly that I now am supposing the objection made. But to meet the objection to the prevention of competition at the same time, I will suppose that three parties apply to a State for charters; one for each of two new and possibly competing lines respectively, and one for both of these lines, and that the charter is granted to the last. I think that charter would be good, and I think the whole argument to the contrary rests [409] on a popular instead of an accurate and legal conception of what the word “monopolize” in the statute means. I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade, until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.

Unless I am entirely wrong in my understanding of what a “combination in restraint of trade” means, then the same monopoly may be attempted and effected by an individual, and is made equally illegal in that case by § 2. But I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many shares as he liked of the Great Northern and the Northern Pacific, even if he bought them

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both at the same time and got more than half the stock of each road.

There is much that was mentioned in argument which I pass by. But in view of the great importance attached by both sides to the supposed attempt to suppress competition, I must say a word more about that. I said at the outset that I should assume, and I do assume, that one purpose of the purchase was to suppress competition between the two roads. I appreciate the force of the argument that there are independent stockholders in each; that it cannot be presumed that the respective boards of directors will propose any illegal act; that if they should they could be restrained, and that all that has been done as yet is too remote from the illegal result to be classed even as an attempt. Not every act done in furtherance of an unlawful end is an attempt or contrary to the law. There must be a certain nearness to the result. It is a question of proximity and degree. *Commonwealth v. Peaslee*, 177 Massachusetts, 267, 272. So, as I have said, is the amenability of acts in furtherance of interference with commerce among the States to legislation by Congress. So, according to the intimation of this court, is the question of liability under the present stat- [410] ute. *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171, U. S. 604. But I assume further, for the purposes of discussion, that what has been done is near enough to the result to fall under the law, if the law prohibits that result, although that assumption very nearly if not quite contradicts the decision in *United States v. E. C. Knight Co.*, 156 U. S. 1. But I say that the law does not prohibit the result. If it does it must be because there is some further meaning than I have yet discovered in the words "combinations in restraint of trade." I think that I have exhausted the meaning of those words in what I already have said. But they certainly do not require all existing competitions to be kept on foot, and, on the principle of the Trans-Missouri Freight Association's case, invalidate the continuance of old contracts by which former competitors united in the past.

A partnership is not a contract or combination in restraint of trade between the partners unless the well known words

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are to be given a new meaning invented for the purposes of this act. It is true that the suppression of competition was referred to in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, but, as I have said, that was in connection with a contract with a stranger to the defendant's business—a true contract in restraint of trade. To suppress competition in that way is one thing, to suppress it by fusion is another. The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone. To see whether I am wrong, the illustrations put in the argument are of use. If I am, then a partnership between two stage drivers who had been competitors in driving across a state line, or two merchants once engaged in rival commerce among the States whether made after or before the act, if now continued, is a crime. For, again I repeat, if the restraint on the freedom of the members of a combination caused by their entering into partnership is a restraint of [411] trade, every such combination, as well the small as the great, is within the act.

In view of my interpretation of the statute I do not go further into the question of the power of Congress. That has been dealt with by my brother White and I concur in the main with his views. I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur in this dissent.

Syllabus.

[48] MINNESOTA *v.* NORTHERN SECURITIES COMPANY.^a**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MINNESOTA.**

No. 433. Argued January 7, 8, 1904.—Decided April 11, 1904.

[194 U. S., 48.]

Consent of parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, this court must, upon its own motion, so declare, and make such order as will prevent the Circuit Court from exercising an authority not conferred upon it by statute.^b

A State is not a citizen within the meaning of the provisions of the Constitution or acts of Congress regulating the jurisdiction of the Federal courts.

Under existing statutes regulating the jurisdiction of the courts of the United States, a case cannot be removed from a state court, as one arising under the Constitution or laws of the United States unless the plaintiff's complaint, bill or declaration shows it to be a case of that character.

While an allegation in a complaint filed in a Circuit Court of the United States may confer jurisdiction to determine whether the case is of the class of which the court may properly take cognizance for purposes of a final decree on the merits, if, notwithstanding such allegation, the court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its jurisdiction then, by the express command of the act of 1875, its duty is to proceed no further. And if the suit, as disclosed by the complaint could not have been brought by plaintiff originally in the Circuit Court, then, under the act of 1887-1888 it should not have been removed from the state court and should be remanded.

The intention of the Anti-Trust Act of July 2, 1890, 26 Stat. 209, was to limit direct proceedings in equity to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States, under § 4 of the act, by District Attorneys of the United States, acting under the direction of the Attorney General; thus securing the enforcement of the act, so far as such direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country.

^a Decree in the Circuit Court (123 Fed., 692). See p. 246.

^b Syllabus and abstracts of arguments copyrighted, 1904, by The Banks Law Publishing Co.

Argument for appellant.

A State cannot maintain an action in equity to restrain a corporation from violating the provisions of the act of July 2, 1890, on the ground that such violations by decreasing competition would depreciate the value of its public lands and enhance the cost of maintaining its public institutions, the damages resulting from such violations being remote and indirect and not such direct actual injury as is provided for in § 7 of the act.

[49] Article IV of the Constitution of the United States only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State, other than that in which the court is sitting. It has nothing to do with the conduct of individuals or corporations.

THE facts are stated in the opinion of the court.

Mr. W. B. Douglas, Attorney General of the State of Minnesota, and *Mr. M. D. Munn*, with whom *Mr. George P. Wilson* was on the brief, for appellant:

As to removal to and jurisdiction of the Circuit Court:

The action was removed on the joint petition of all the defendants, on the ground that it arose under the Constitution and laws of the United States, and that the right upon which it was based and on which a recovery by plaintiff depended, would be defeated by one construction of the Constitution or said laws, and sustained by an opposite construction. Diverse citizenship did not form a basis for such removal, *Postal Telegraph Cable Co. v. Alabama*, 155 U. S. 482, and could not rightfully be presented as a ground therefor.

As to the doing of business by the Northern Securities Company within Minnesota and attempt to vacate service of summons, see *Goldey v. Morning News Co.*, 156 U. S. 518; *Wabash Western Railway v. Brow*, 164 U. S. 271.

The Circuit Court has jurisdiction of all civil actions in part arising under or depending upon the construction of the Constitution, laws or treaties of the United States. 24 Stat. 552; 25 Stat. 433; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482; *Ames v. Kansas*, 111 U. S. 462; *Gold-Washing and Water Co. v. Keyes*, 96 U. S. 203; *Shoshone Mining Co. v. Rutter*, 177 U. S. 507; *Cummings v. Chicago*, 188 U. S. 410.

Argument for appellant.

Read in the light of section 5 of the Court of Appeals Act—chap. 517 of the laws of 1891—it is equally clear that jurisdiction is assumed to exist in the Circuit Courts and an appeal authorized “in any case that involves the construction or application of the Constitution of the United States.”

[50] The Supreme Court of the United States is without original jurisdiction of this controversy. *Minnesota v. Northern Securities Co.*, 184 U. S. 199.

Assuming the facts to be as stated in the affidavit of the president of the Securities Company, above referred to, to the effect that the Securities Company is not the owner of any property situated in Minnesota and never transacted any business therein, the courts of Minnesota cannot acquire jurisdiction to hear and determine the issues involved herein, a jurisdiction over the person of the Securities Company cannot be obtained. *Pennoyer v. Neff*, 95 U. S. 714; *St. Clair v. Cox*, 106 U. S. 350; *Goldley v. Morning News Co.*, 156 U. S. 518; *Barrow Steamship Co. v. Kane*, 170 U. S. 100; *Cabanne v. Graf*, 87 Minnesota, 510; *Conley v. Matheson Alkely Works*, 190 U. S. 406.

The Northern Pacific and Great Northern Railway companies are necessary parties with the Securities Company, and being residents of different States and not engaged in doing business in any single State, jurisdiction of the person of all the defendants cannot be obtained elsewhere than in this court, in which the Securities Company has voluntarily appeared. *Minnesota v. Northern Securities Company*, *supra*.

Under *California v. Southern Pacific Ry. Co.*, 157 U. S. 270, and *Minnesota v. Northern Securities Co.*, unless a Federal question is deemed to exist in this record which gives to the Circuit Court jurisdiction over the subject matter of the action, under our dual form of government, a State will be deprived of the right to invoke the jurisdiction of any court in the land for the purpose of enforcing its laws or protecting its proprietary interests from unlawful acts done in violation of the laws of the State or Nation.

Two Federal questions are clearly set forth in appellant's bill of complaint. Whether the State to protect its proprietary interests had a cause of action against the defend-

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ants arising in part under the Federal Anti-Trust Act; and whether the state Anti-Consolidation and Anti-Trust acts (rightly con- [51] strued) had been violated. This presents a controversy between the appellant and the defendants, the correct determination of which involves or depends upon the construction and the application of the commerce clause as well as Article IV of the Constitution of the United States.

An issue was tendered in which the appellant alleged the commission of certain acts by the defendants which were specifically asserted to be not only seriously injurious to its proprietary interest, but in violation of the Federal Anti-Trust Act, and the learned trial court in its decision actually construed the act adversely to one contention of appellant and this construction rendered it unnecessary for the court to construe the act with reference to the other questions submitted. In this portion of the decree the court construed the act as excluding the appellant from invoking equity jurisdiction for its enforcement. Again, upon the argument in this court appellant's contentions upon both propositions were strenuously opposed by counsel for appellees.

It is therefore submitted that the pending controversy is one in part "arising under and depending upon the construction of the laws of the United States." Cases cited *supra*, and *Cummings v. Chicago*, 188 U. S. 410; *Defiance Water Co. v. Defiance*, 191 U. S. 184; *N. P. Railway Co. v. Townsend*, 190 U. S. 270.

The test as to jurisdiction of the Circuit Court is clearly stated in the opinion of the court in *Gold-Washing & Water Co. v. Keyes*, *supra*, and affirmed in the case of *Shoshone Mining Co. v. Rutter*, *supra*, see p. 507; *Railroad Company v. Mississippi*, 102 U. S. 141; *Chapman v. Goodnow*, 123 U. S. 540; *Kaukauna Co. v. Green Bay & Canal Co.*, 142 U. S. 254, and cases cited; *O'Veil v. Vermont*, 144 U. S. 323.

If this construction of the act of Congress obtains in the application of the rule invoked, it is clear from the record that the State has suffered, and will continue from year to year to suffer, damages to its proprietary interests which will be difficult, if not impossible, to measure, running into millions of dollars. *Parker v. W. L. C. & W. Co.*, 2 Black,

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551, and cases cited; *Clark v. Smith*, 13 How. 194; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518.

Upon the proposition that a State may sue to redress injuries which are strictly analogous to those suffered by private individuals, see *United States v. San Jacinto Tin Co.*, 125 U. S. 273; *United States v. Am. Bell Tel. Co.*, 128 U. S. 315, 317; *Missouri v. Illinois*, 180 U. S. 240; *Kansas v. Colorado*, 185 U. S. 125.

The violation of the Minnesota Anti-Consolidation and Anti-Trust Act, rightfully construed, involves, as applied to this controversy, the construction and the application of Article IV of the Federal Constitution, as well as the commerce clause. For history of the clause, see Elliott's Debates, vol. 4, 123, vol. 5, 487, 504.

The gravamen of the charge in appellant's complaint is that the defendants created a corporate device in New Jersey and used it for the purpose and with the result that property rights in Minnesota were affected, in violation of its laws. Our contention is that Article IV must be so construed as to make the constitutional enactments of Minnesota effective throughout the United States, so far as they apply to and affect property rights within the State. Otherwise the policy and laws of any State may be easily evaded.

The test of jurisdiction must necessarily be determined by a correct answer to the question: What issues were fairly tendered for determination by the bill of complaint? If this be not the test, the trial court, by misconstruing a statute, has the power to eliminate from the record a jurisdictional question and deprive a party of the right of appeal.

The question of whether or not the case was properly removed from the state to the Federal court, is in itself a Federal question. *Railroad Company v. Koontz*, 104 U. S. 15. The determination of this question in itself gives the right of appeal to this court direct.

The case having been appealed to this court, and this court, [53] on its own motion, having questioned the correctness of the removal from the state to the Federal court, that establishes the jurisdiction of this court on appeal over the entire case should this court determine that the

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case was properly removed from the state to the Federal court. *Oakley v. Goodnow*, 118 U. S. 44; *Scott v. Goodnow*, 165 U. S. 58; *Carter v. Texas*, 177 U. S. 442.

Mr. John G. Johnson, and *Mr. George B. Young*, with whom *Mr. M. D. Grover* and *Mr. C. W. Bunn* were on the brief, for appellees:

On the question of removal to and jurisdiction of the Circuit Court:

The cause was properly removed to the Circuit Court, and upon such removal that court acquired jurisdiction of it as a "suit arising under the Constitution and laws of the United States."

As to the test of such a suit as determined by Chief Justice Marshall, see *Osborn v. Bank*, 9 Wheat. 738, 822, in which it was held that a cause may depend upon several questions of fact and law. Some of these may depend on the construction of a law of the United States, others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the Constitution or laws of the United States and sustained by the opposite construction provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this which gives that jurisdiction. Under this construction, the judicial power of the United States extends effectively and beneficially to that most important class of cases which depends on the character of the cause. See also *Cohens v. Virginia*, 6 Wheat. 264, 379.

The following cases were decided under the act of 1875: *Gold-Washing Co. v. Keyes*, 96 U. S. 199, 201; *Tennessee v. Davis*, 100 U. S. 257, 264; *Railroad Co. v. Mississippi*, 102 U. S. 135, 140; *Ames v. Kansas*, 111 U. S. 449, 462; *Kansas* [54] *Pacific v. Atchison R. R.*, 112 U. S. 414; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Starin v. New York*, 115 U. S. 248, 257; *Southern Pacific R. Co. v. California*, 118 U. S. 109, 112; *Metcalf v. Watertown*, 128 U. S. 586; *Shreveport v. Cole*, 129 U. S. 36, 41; *Beck v. Perkins*, 139 U. S. 628. In the act of 1887-8, Congress used the same terms as in the

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act of 1875, in the same sense and reenacted them as thus construed.

And this court has never intimated that the criterion declared by Chief Justice Marshall and adopted and applied by itself in so many cases was erroneous in itself or had been rendered inapplicable to any class of cases by the amending act of 1887-8. The following cases originated after the latter act: *Cooke v. Avery*, 147 U. S. 375, 384; *Colorado Central Mining Co. v. Turck*, 150 U. S. 138, 143; *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571, 580; *Patton v. Brady*, 184 U. S. 608, 611; *Swafford v. Templeton*, 185 U. S. 487, 494; *Northern Pacific Ry. Co. v. Soderberg*, 188 U. S. 526.

As it is the proper function of the plaintiff's pleading to state his own case and not that of the defendant, to give jurisdiction the Federal question must appear in plaintiff's statement of his own case, or of his own claim, and that is all that is required.

In a few cases there are expressions—inadvertent, no doubt—to the effect that the plaintiff's declaration must show that he asserts a right under the Constitution or some law of the United States,—as if only such suits were suits arising under the United States Constitution or laws. But this is directly opposed to the cases already cited and others that will be cited.

If such a requirement were essential to jurisdiction, one whose property was wrongfully seized by a United States marshal or revenue collector, or whose property was taken or his person or property injured by a Federal railway corporation, could have no redress in the Federal courts. His right of property or of personal security is not derived from the United States Constitution or laws, and when he asserts either [55] in a declaration he is not asserting a right under the United States Constitution or laws.

For trespass against a marshal, see *Bock v. Perkins*, 139 U. S. 628; *Sonnenheil v. Brewing Co.*, 172 U. S. 401. And compare *Walker v. Collins*, 167 U. S. 57. Against an internal revenue collector, see *Venable v. Richards*, 105 U. S. 636; *Harding v. Woodcock*, 137 U. S. 43.

The bill presents Federal questions both in its aspect of a bill by the State as a sovereign to enforce its local statutes,

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and as a landowner and shipper for relief under those statutes. And these questions are the same whether the State sues as sovereign or as property owner and shipper or in both of these capacities.

For cases analogous to the one at bar, see *South Carolina v. Coosaw Mining Co.*, 45 Fed. Rep. 804; 47 Fed. Rep. 225; 144 U. S. 550, cited with approval in *In re Debs*, 158 U. S. 564; *Ames v. Kansas*, 111 U. S. 449; *Harding v. Woodcock*, 137 U. S. 43; *South Carolina v. Port Royal &c. Ry. Co.*, 56 Fed. Rep. 333; *People v. Rock Island &c. Ry. Co.*, 71 Fed. Rep. 753; *Minnesota v. Duluth &c. Ry. Co.*, 87 Fed. Rep. 497; *Tennessee v. Union Bank*, 152 U. S. 454.

The cause was properly removed because of the plaintiff's assertion of right and claim of relief under the Constitution and laws of the United States.

Besides the claims of the State under the full faith and credit clause of Article IV of the Constitution, and its claim under the swamp land granting acts of Congress, the State asserts a right as a property owner and as engaged in interstate commerce to carry on that commerce free from obstruction by combinations in restraint of commerce or by monopolies of such commerce—substantially the same right as that asserted by the United States in the *Debs Case*, 158 U. S. 564, 583. A citizen's right to carry on interstate commerce is a constitutional right. *Crutcher v. Kentucky*, 141 U. S. 47, 57; *Reid v. Colorado*, 187 U. S. 137. And there can be no doubt that a State has the same right as a citizen.

[56] The bill plainly asserts a right under the Constitution as well as under the Anti-Trust Act, and this gives jurisdiction. Whether the bill sufficiently alleges continuous or threatened injury to that right to make a case for the relief prayed or for any equitable relief is not a question of jurisdiction, but a question for the court to decide in the exercise of jurisdiction. *Swafford v. Templeton*, 185 U. S. 487, 493; *Southern Pacific R. Co. v. California*, 118 U. S. 112; *Haz v. Caspar*, 31 Fed. Rep. 499; *Lowry v. Chicago, B. & Q. R. Co.*, 46 Fed. Rep. 83.

The Circuit Court in a case like this, upon acquiring jurisdiction of the cause by reason of the Federal questions presented by the bill on the constitutionality of the state legisla-

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tion and on the claim of rights under the Constitution and laws, has jurisdiction to decide, not only these Federal questions, but every question, Federal or non-Federal, that may be presented by the bill or arise upon the other pleadings or the evidence. *Osborn v. Bank of United States*, *supra*. It may decide the cause on these non-Federal grounds, without deciding or even considering the Federal questions presented by the bill. And this is the proper course where the Federal questions are constitutional questions. *Santa Clara Co. v. Southern Pacific R. R.*, 118 U. S. 394, 410. Its jurisdiction remains the same although the plaintiff should fail to establish by proofs the facts alleged as showing a right under the Constitution or laws or otherwise raising a Federal question, for the jurisdiction is determined by the averments of the bill. *Southern Pacific R. Co. v. California*, 118 U. S. 109, 112; *City Ry. Co. v. Citizens R. R. Co.*, 166 U. S. 537, 562.

And the fact that the Federal questions may receive little or no attention in the argument in this court, or even in the Circuit Court, does not affect the jurisdiction of either court. It may pass by the questions argued and decide the Federal questions.

MR. JUSTICE HARLAN delivered the opinion of the court.

By a statute of Minnesota passed March 9, 1874, it was provided that no railroad corporation or the lessees, purchasers or managers thereof should consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad corporation owning or having under its control a parallel or competing line; nor should any officer of such corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line; and the question whether railroads were parallel or competing lines should, when demanded by the party complainant, be decided by a jury as in other civil issues. *Laws, Minnesota, 1874, p. 154.*

A subsequent statute, passed March 3, 1881, provided that any railroad corporation, either domestic or foreign, whether organized under a general law or by virtue of a special charter, might lease or purchase, or become owner of or control,

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or hold the stock of, any other railroad corporation, when the respective railroads could be lawfully connected and operated together "so as to constitute one continuous main line, with or without branches," § 1; and that any railroad corporation, whose lines of railroad, within or without the State, might be lawfully connected and operated together to constitute one continuous main line, so as to admit of the passage of trains over them without break or interruption, "could consolidate their stock and franchises so as to become one corporation." § 2. But by the same statute it was provided that no railroad corporation should consolidate with, lease or purchase, or in any way become owner of, or control any other railroad corporation, or any stock, franchises, rights of property thereof, which owned or controlled "a parallel or competing line." § 3. Laws of Minnesota, 1881, p. 109.

At a later date, 1899, the Legislature of Minnesota passed another statute relating principally to such restraints upon trade and commerce as interfered with competition among those engaged therein. That statute contained these provisions:

[58] "SEC. 1. Any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into which is in restraint of trade or commerce within this State, or in restraint of trade or commerce between any of the people of this State and any of the people of any other State or country, or which limits or tends to limit or control the supply of any article, commodity or utility, or the articles which enter into the manufacture of any article [or] utility, or which regulates, limits or controls or raises or tends to regulate, limit, control or raise the market price of any article, commodity or utility, or tends to limit or regulate the production of any such article, commodity or utility, or in any manner destroys, limits or interferes with open and free competition in either the production, purchase or sale of any commodity, article or utility, is hereby prohibited and declared to be unlawful.

"That when any corporation heretofore or hereafter created, organized or existing under the laws of this State, whether general or special, hereafter unites in any manner with any other corporation wheresoever created, or with any individual, whereby such corporation surrenders or transfers, by sale or otherwise, in whole, or in part, its franchise, rights or privileges or the control or management of its business to any other corporation or individual, or whereby the business or the management or control of the business of such corporation is limited, changed or in any manner affected, and the purpose or effect of such union or combination is to limit, control or destroy competition in the manufacture or sale of any article or commodity, or is to limit or control the production of any article or commodity, or is to control or fix the price or market value of any article or commodity, or the price or market value of the material entering into the production of any article or commodity, or in case the purpose or effect of such union or combination

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is to control or monopolize in any manner the trade or commerce, or any part thereof, of this State or of the several States, such union, combination, agreement, arrange- [59] ment or contract is hereby prohibited and declared to be unlawful. * * *

"SEC. 3. Any corporation heretofore or hereafter created, organized or existing under the laws of this State, which shall hereafter either directly or indirectly make any contract, agreement or arrangement, or enter into any combination, conspiracy or trust, as defined in section one of this act, shall, in addition to the penalty prescribed in section two of this act, forfeit its charter, rights and franchises, and it shall thereafter be unlawful for such corporation to engage in business, either as a corporation or as a part of any combination, trust or monopoly, except as to the final disposition of its property under the laws of this State. * * *

"SEC. 6. That for the purpose of carrying out the provisions of this act any citizen of this State may, and it is hereby declared to be the duty of the Attorney General, to institute, in the name of the State, proceedings in any court of competent jurisdiction against any person, partnership, association or corporation who may be guilty of violating any of the provisions of section one of this act, for the purpose of imposing the penalties imposed by this act, or securing the enforcement of section three hereof." Gen. Laws, Minnesota, 1899, c. 359.

These statutes being in force, the State of Minnesota instituted this suit in one of its own courts against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin, which, having filed its articles of incorporation with the Secretary of State of Minnesota, became subject to the laws of that State relating to railroad corporations; and James J. Hill, as President of the Northern Securities Company, and individually.

What is the nature of the case as disclosed by the complaint filed in the state court?

The complaint alleged—

That the Great Northern Railway Company and the Northern [60] Pacific Railway Company each owned or controlled and maintained a system of railways connecting the Great Lakes and the Pacific Ocean, their main roads constituting, substantially, parallel and competing lines;

That pursuant to an agreement between the defendant Hill and other stockholders of the Great Northern Railway Company (representing a controlling interest in the stock of that company) and J. Pierpont Morgan and other stockholders of the Northern Pacific Railway Company (representing a controlling interest in the stock of that company) the Northern Securities Company was incorporated solely as

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an instrumentality through which the stock, property and franchises of the Great Northern and Northern Pacific Railway companies should be consolidated in effect, if not in form, and the management and control of their business affairs, respectively, including the fixing of rates and charges for the transportation of passengers and freight over any and all the lines of railway of each of those companies, as well within as without the State, be vested in and controlled by the Securities Company, and all competition in freight and passenger traffic between the two systems of railway, within and without the State, to be suppressed and removed; that by means of such arrangement it was sought and intended to ignore, evade and violate the laws of the State prohibiting as well the consolidation of the stock, property or franchise of parallel or competing lines of railway therein, and the control or management thereof, as all combinations in restraint of trade or commerce within the State, and between the people of Minnesota and the people of other States and countries; and, that if the Securities Company was allowed to hold and control the stocks of the constituent railway companies and to carry out the purpose and object of its incorporators, as well as its own, "full faith and credit will not be given to the public acts of this complainant and it will be deprived of a further right guaranteed to it by the Constitution of the United States;"

That the said scheme had been consummated, and said two [61] railway systems were now under the absolute management and control of the Securities Company, and "by reason thereof all competition between said lines has been destroyed and a monopoly in railway traffic in Minnesota (as well as without said State) has been created, to the great and permanent and irreparable damage of the State of Minnesota, and to the people thereof, and in violation of its laws, and of the laws of the United States in such case made and provided, viz: The act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies;'" and

That the carrying out the above agreements and plan of consolidation and monopoly, and in every step taken to consummate it, the officers and directors of each of said railway

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• companies were severally fully advised and consented thereto, and, unless restrained by this court, the Securities Company would continue to manage and control the business and affairs of the Great Northern and Northern Pacific Railway companies, and to suppress all competition between them for freight and passenger traffic, as well as to monopolize railway traffic in that State, to the irreparable damage of the State and the people thereof.

The substantial relief asked was a decree declaring, among other things, the alleged agreement and combination to be unlawful, and all acts done and to be done in pursuance thereof contrary to and in violation of the laws of Minnesota and of the United States; prohibiting the Securities Company, its agents and officers, from acquiring, receiving, holding, voting or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific or the Great Northern Railway Company, or from exercising any management, direction or control over the constituent companies; and enjoining those railway companies from recognizing or accepting the Northern Securities Company as the holder or owner of any shares of the capital stock of either of those companies, or from effecting any combination or agreement [62] that would disturb their independent integrity, management and control, respectively, or that would directly or indirectly destroy free and unlimited competition between them by interchange of traffic, poolings of earnings, division of property or otherwise.

The Securities Company, appearing specially for that purpose, filed its petition for the removal of the case into the Circuit Court of the United States upon the ground that the suit was of a civil nature, in equity, involved, exclusive of costs, the sum of two thousand dollars, and was *one arising under the Constitution and laws of the United States*.

The state court approved the required statutory bond for removal, and made an order, reciting that the case was removed to the Federal court.

The Northern Securities Company, appearing specially for that purpose, gave notice of a motion to have the service of summons upon it vacated. Notice was also given of a like

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motion as to the service of summons upon defendant Hill in his capacity as President of that company. Subsequently, the company, and defendant Hill as its President, gave notice that the above notices were withdrawn, and they accordingly entered their appearance in the cause.

At a later date the defendants severally answered, and the State filed its replication to each answer. Proofs were taken, and the cause having been heard, the bill was dismissed upon the merits. 123 Fed. Rep. 692.

After the cause was argued here the parties were invited to submit briefs upon the question whether the Circuit Court of the United States could take cognizance of the case upon removal from the state court. From the briefs filed in response to that invitation it appeared that both sides deemed the case a removable one and insist that this court should consider the merits as disclosed by the pleadings and evidence. But consent of parties can never confer jurisdiction upon a Federal court. If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own [63] motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute. *Mansfield C. & L. M. Railway Co. v. Swan*, 111 U. S. 379, 382; *Robertson v. Cease*, 97 U. S. 646; *King Bridge Co. v. Otoc County*, 120 U. S. 225; *Parker v. Ormsby*, 141 U. S. 81; *Mattingly v. Northwestern Va. R. R.*, 158 U. S. 53, 57; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 453; *Continental National Bank v. Buford*, 191 U. S. 119; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194.

We proceed, therefore, to inquire whether the Circuit Court could take cognizance of this case upon removal from the state court and make a final decree upon the merits.

Of course, the Circuit Court could not take cognizance of the case as one presenting a controversy between citizens of different States; for the State of Minnesota is not a citizen within the meaning of the Constitution or the acts of Congress. *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 487.

But the first section of the Judiciary Act of 1887—8, 24 Stat. 552, c. 373; 25 Stat. 433, c. 866, provides, among other things, that the Circuit Courts of the United States may take original cognizance of all suits of a civil nature at law or in equity, arising under the Constitution or laws of the United States,

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where the matter in dispute, exclusive of costs, exceeds in value the sum of two thousand dollars. And the second section provides for the removal from a state court of "any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States * * * of which the Circuit Courts of the United States are given original jurisdiction by the preceding section."

In *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 461, which involved the scope and meaning of the acts of 1887-8, in respect of cases arising under the Constitution or laws of the United States, this court, after referring to section one, said: "But the corresponding clause in section 2 allows removals from a state court to be made only by defendants, and of suits 'of which the Circuit Courts of the United States are given [64] original jurisdiction by the preceding section,' thus limiting the jurisdiction of a Circuit Court of the United States *on removal* by the defendant under this section to such suits *as might have been brought* in that court *by the plaintiff under the first section*. 24 Stat. 553; 25 Stat. 434. The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit Courts of the United States." *Mexican Nat. Railroad v. Davidson*, 157 U. S. 201, 208; *Metcalf v. Watertown*, 128 U. S. 586. And in *Chappell v. Walworth*, 155 U. S. 102, 107, the court, referring to *Tennessee v. Union & Planters' Bank*, said that it was there adjudged, upon full consideration, that, under the act of 1887-8, "a case (not depending on the citizenship of the parties, nor otherwise specially provided for,) cannot be removed from a state court into the Circuit Court of the United States, *as one arising under the Constitution, laws or treaties of the United States*, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or, in the subsequent pleadings." To the same effect are *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 487; *United States v. American Bell Tel. Co.*, 159 U. S. 548, 553; *Oregon Short Line v. Skottowe*, 162 U. S. 490, 494; *Texas & Pacific Railway Co. v. Cody*, 166 U. S. 606, 608; *Pratt v. Paris Gas Light & Coke Co.*, 168 U. S. 255, 258; *Walker v. Collins*,

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167 U. S. 57, 59; *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185; *Western Union Tel. Co. v. Ann Arbor Railroad Co.*, 178 U. S. 239. These cases establish, beyond further question in this court, the rule that, under existing statutes regulating the jurisdiction of the courts of the United States, a case cannot be removed from a state court, as one arising under the Constitution or laws of the United States, unless the plaintiff's complaint, bill or declaration shows it to be a case of that character. "If it does not appear at the outset," this court has quite recently said, "that the suit is one of which the Circuit Court at the time its jurisdiction [65] is invoked could properly take cognizance, the suit must be dismissed." *Third St. & Suburban Ry. v. Lewis*, 173 U. S. 457, 460.

We must then inquire whether the complaint presents a case arising under the Constitution or laws of the United States, in respect of which the original jurisdiction of the Circuit Court could have been invoked by the state.

The real purpose of the suit was to annul the agreement and suppress the combination alleged to exist between the defendant corporations upon the ground that such agreement and combination were in violation, first, of the laws of Minnesota, and, second, of the *Anti-Trust Act of Congress*. If relief had been asked upon the ground alone that what the defendant corporations had done and would, unless restrained, continue to do, was forbidden by the statutes of Minnesota, the Circuit Court of the United States could not have taken cognizance of the case; for confessedly such a controversy would not have been one between citizens of different States, nor could such a suit have been deemed one arising under the Constitution or laws of the United States.

The contention, however, is that a case arising under the laws of the United States was presented by the allegation in the complaint that the combination and consolidation between the Great Northern and Northern Pacific Railway Companies and their control of their affairs and operations by the Northern Securities Company, were also in violation of the *Anti-Trust Act of Congress of July 2, 1890*. An allegation in a complaint filed in a Circuit Court of the United States may, indeed, in a sense, confer jurisdiction to determine whether the case is of the class of which the court may

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properly take cognizance for purposes of a final decree on the merits. *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, and *Pacific Electric Ry. Co. v. Los Angeles*, *post*, page 112, decided at present term. But if, notwithstanding such an allegation, the court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its jurisdiction then, by the [66] express command of the act of 1875, its duty is to proceed no further. That is manifest from the fifth section of that act, which provides "That if, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just." 18 Stat., 470. That provision has not been superseded by any subsequent legislation.

Does the present suit really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court? That is to say, could the suit, as disclosed by the complaint, have been brought by the State originally in that court? If it could not, then, under the act of 1887-8 and the adjudged cases, it should not have been removed from the state court and should be remanded.

By the first section of the Anti-Trust Act every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, is declared to be illegal. The second section condemns the monopolizing or attempting to monopolize, or combining or conspiring to monopolize, any part of such trade or commerce. By the third section, every contract, combination in the form of trust or otherwise, or conspiracy in restraint of commerce in any Territory of the United States

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or the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or [67] with any foreign States, or between the District of Columbia and any State or States or foreign nations, is declared to be illegal. A violation of the provisions of each section is made a misdemeanor, punishable by a fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. Of course, a criminal prosecution under the act must be in the name of the United States and in a court of the United States—the District Attorney who conducts the prosecution being subject to the direction of the Attorney General as to the manner in which his duties shall be discharged. Rev. Stat. 362.

The fourth, sixth, seventh and eighth sections of the act are as follows:

"SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several District Attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

"SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure and condemnation of property imported into the United States contrary to law.

[68] "SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"SEC. 8. That the word 'person,' or 'persons,' wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State or the laws of any foreign country." 28 Stat. 209.

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It thus appears that the act specifies four modes in which effect may be given to its provisions. It is clear that the present suit does not belong to either of those classes. It is not a criminal proceeding, (§§ 1, 2, 3,) nor a suit in equity in the name of the United States to restrain violations of the Anti-Trust Act, (§ 4,) nor a proceeding in the name of the United States for the forfeiture of property being in the course of transportation, (§ 6,) nor an action by any person or corporation for the recovery of threefold damages for injury done to business or property by some other person or corporation. (§§ 7, 8.)

But it is said that as the act of Congress was for the benefit of all the States and all the people, this case is to be deemed one arising under the laws of the United States, and, therefore, cognizable by the Circuit Court, because one of the objects of the State of Minnesota by its suit is to protect certain of its proprietary interests, which, it is alleged, would be injured by violations, on the part of the defendants, of the act of Congress. Let us see what, in that view, is the case as presented by the complaint.

The complaint alleged that the State is the owner of more than three million acres of land, of the value of more than fifteen millions of dollars, obtained, by donation, from the United States, and that "the value of said lands, and the [69] salability thereof, depends, in very large measure, upon having free, uninterrupted and open competition in passenger and freight rates over the lines of railway owned and operated by said Great Northern and Northern Pacific Railway companies."

The bill also alleges "that many of said lands are vacant and unsettled and located in regions not at present reached by railway lines, and depend for settlement upon the construction of lines in the future; that it has heretofore been the practice of said Great Northern and Northern Pacific Railway companies, respectively, to extend spur lines into territory adjacent to each of said roads, as well as into new territory, for the purpose of developing such territory, as well as to obtain traffic therefrom; that such new lines have been built in the past very largely by reason of the rivalry heretofore existing between said companies for exist-

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ing, as well as new, business; that under the consolidation and unity of control hereinafter set forth such rivalry will cease, and many of the lands now owned by the State of Minnesota will not be reached by railroads for years to come, if at all, owing to such combination and consolidation removing all rivalry and competition between said companies; that the settlement and occupation of said lands will add very much to their value, and such occupation will depend entirely upon the accessibility of railway lines and transportation facilities for marketing the products raised thereon; that if said lands are sold and become occupied, they will add very largely to the taxable value of the property of the State, and that said lands cannot be so sold, or the income of the State increased thereby, without the construction of railroad lines to or adjacent to the same."

It was further alleged that the State is the owner of, and has maintained at large expense, a state university, hospitals for the insane, normal schools for teachers, a training school for boys and girls, schools for deaf, dumb, blind and feeble-minded persons, a state school for indigent and homeless children, and a state penitentiary; that a great portion of the supplies of every kind for such institutions must, of necessity, be shipped [70] over the different lines of railway owned and operated by the Northern Pacific and Great Northern Railway companies; that the amount of taxes which the State must collect, and the successful maintenance of its public institutions, as well as the performance of its governmental functions and affairs, depend largely upon the value of the real and personal property situated within the State and the general prosperity and business success of its citizens; and that such prosperity and business depend very largely upon maintaining in the State free, open and unrestricted competition between the railway lines of those two companies.

The injury on account of which the present suit was brought is at most only remote and indirect; such an injury as would come alike, although in different degrees, to every individual owner of property in a State by reason of the suppression, in violation of the act of Congress, of free competition between interstate carriers engaged in business in such State; not

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such a direct, actual injury as that provided for in the seventh section of the statute. If Minnesota may, by an original suit, in its name, invoke the jurisdiction of the Circuit Court, because alone of the alleged remote and indirect injury to its proprietary interests arising from the mere absence of free competition in trade and commerce as carried on by interstate carriers within its limits, then every State upon like grounds may maintain, in its name, in a Circuit Court of the United States, a suit against interstate carriers engaged in business within their respective limits. Further, under that view, every individual owner of property in a State may, upon like general grounds, by an original suit, irrespective of any direct or special injury to him, invoke the original jurisdiction of a Circuit Court of the United States, to restrain and prevent violations of the Anti-Trust Act of Congress. We do not think that Congress contemplated any such methods for the enforcement of the Anti-Trust Act. We cannot suppose it was intended that the enforcement of the act should depend in any degree upon original suits in equity instituted by the States or by [71] individuals to prevent violations of its provisions. On the contrary, taking all the sections of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the Anti-Trust Act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States, under the fourth section of the act, by District Attorneys of the United States, acting under the direction of the Attorney General; thus securing the enforcement of the act, so far as direct proceedings in equity are concerned, according to some uniform plan, operative throughout the entire country. Possibly the thought of Congress was that by such a limitation upon suits in equity of a general nature to restrain violations of the act, irrespective of any direct injury sustained by particular persons or corporations, interstate and international trade and commerce and those carrying on such trade and commerce, as well as the general business of the country, would not be needlessly disturbed by suits brought, on all sides and in every direction, to accomplish

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improper or speculative purposes. At any rate, the interpretation we have given of the act is a more reasonable one. It is a safe and conservative interpretation, in view as well of the broad and exclusive power of Congress over interstate and international commerce as of the fact that, so far as such commerce is concerned, Congress has prescribed a specific mode for preventing restraints upon it, namely, suits in equity under the direction of the Attorney General. Of the present suit the Attorney General has no control, and is without any responsibility for the manner in which it is conducted, although, in its essential features, it is just such a suit as would be brought by his direction when proceeding under the fourth section of the Anti-Trust Act.

The State presents still another view of the question of jurisdiction. Its complaint alleges that if the Securities Company be allowed to hold and control the stocks of the Great Northern [72] and Northern Pacific Railway companies and to carry out the purpose and object of its incorporation, full faith and credit will not be given to the public acts of the State. This, it is contended, presents a case arising under Article IV of the Constitution, providing that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." It is said by the state's counsel that the "gravamen of the charge in appellant's complaint is that the defendants created a corporation device in New Jersey and used it for the purpose and with the result that property rights in Minnesota were affected, in violation of its laws. Our contention is that Article IV must be so construed as to make the constitutional enactment of Minnesota effective throughout the United States, so far as they apply to and affect property rights within the State. Otherwise the policy and laws of any State may be easily evaded." We do not think that the rights within the State. Otherwise the policy and laws of any State may be easily evaded." We do not think that the clause of the Constitution above quoted has any bearing whatever upon the question under consideration. It only prescribes a rule by which courts, Federal and State, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts,

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records and judicial proceedings of a State other than that in which the court is sitting. Even if it be assumed that the word "acts" includes "statutes," the clause has nothing to do with the conduct of individuals or corporations; and to invoke the rule which it prescribes does not make a case arising under the Constitution or laws of the United States.

What was the duty of the Circuit Court when it ascertained that the suit was not one of which it could take cognizance? The answer is indicated by the clause of the Judiciary Act of March 3, 1875, to which we have adverted.

For the reasons stated, we are of opinion that the suit does not—to use the words of the act of 1875—really and substantially involve a dispute or controversy within the jurisdiction of the Circuit Court for the purposes of a final decree. *Western Union Tel. Co. v. Ann Arbor R. R. Co.*, 178 U. S. 239, 243. [73] That being the case, the Circuit Court, following the mandate of the statute, should not have proceeded therein, but should have remanded the cause to the state court.

The decree of the Circuit Court is reversed and the case is sent back with directions that it be remanded to the state court.

[618] FIELD v. BARBER ASPHALT PAVING COMPANY.^a

BARBER ASPHALT PAVING COMPANY v. FIELD.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF MISSOURI.

Nos. 201, 202. Argued April 11, 1904.—Decided May 31, 1904.

[194 U. S., 618.]

Where there are allegations of diverse citizenship in the bill, but the jurisdiction of the Circuit Court is also invoked on constitutional grounds the case is appealable directly to this court under § 5 of the act of March 3, 1891, as one involving the construction or application of the Constitution of the United States, and where both parties have appealed the entire case comes to this court, and the respondent's appeal does not have to go to the Circuit Court of Appeals.^b

^a Decision in the Circuit Court (117 Fed., 925). See p. 192.

^b Syllabus copyrighted, 1904, by The Banks Law Publishing Co.

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It is not the purpose of the Fourteenth Amendment to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed.

The provision in § 5989, Rev. Stat. of Missouri, that certain improvements are not to be made if a majority of resident owners of property liable to taxation protest, is not unconstitutional because it gives the privilege of protesting to them and not to non-resident owners.

Only such acts as directly interfere with the freedom of interstate commerce are prohibited to the States by the constitution, and the Sherman Act of July 2, 1890, is not intended to affect contracts which have only a remote and indirect bearing on commerce between the States. The specification in an ordinance, not invalid under the laws of the State, that a particular kind of asphalt produced only in a foreign country does not violate any Federal right.

Although the agent of the company obtaining a paving contract may have been active and influential in obtaining signatures to the petition, in the absence of proof of fraud and corruption, the levies will not be set aside after the improvement has been completed.

The necessity for an improvement of streets is a matter of which the proper municipal authorities are the exclusive judges and their judgment is not to be interfered with except in cases of fraud or gross abuse of power.

[The specification in an ordinance by a municipal council that Trinidad Lake asphalt shall be used for street improvement, does not violate the commerce clause of the Federal Constitution or the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 290), notwithstanding this particular kind of asphalt is the product of a foreign country and competitive bidding was thereby rendered impossible.]

THESE cases are appeals from the decree of the Circuit Court of the United States for the Western District of Missouri. [619] Richard H. Field, as owner of certain lands abutting on Main street, Baltimore avenue and Wyandotte street in Westport, Missouri, which city was then a suburb, and has since become a part, of Kansas City, filed a bill of complaint against the paving company. The relief sought was against certain tax bills, issued to pay for the paving of the above-named streets, held by the defendant company, and to have the same declared void because (1) the act under which they were assessed violated the Fourteenth Amendment to the Constitution of the United States; (2) that the

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paving in question was unnecessary and the contract for the same was the result of undue and illegal influence on the part of the agents of the defendant company exercised upon the board of aldermen of the city of Westport; (3) that the contracts for the paving required the same to be constructed of Trinidad Lake asphalt, thereby cutting off competition with other kinds of asphalt suitable for street paving; (4) that the proceedings and agreements by which such asphalt was designated in the resolutions, ordinances and rules for the construction of said pavements were in violation of the interstate commerce clause of the Constitution of the United States (Art. 1, sec. 8); and (5) that the said resolutions, ordinances and contracts and the action of the defendant company in securing the same were in violation of the Federal Anti-Trust Act of July 2, 1890.

Upon the trial, the Circuit Court held against the prayer of the complainant for relief upon the Federal grounds alleged, but, holding that the paving of Wyandotte street was unnecessary, granted the prayer of the bill as to the tax bills issued for work done on that street, and dismissed the bill as to the other two streets.

From so much of the decree as held the tax bills for the work done on Wyandotte street invalid the paving company also appealed. (Case No. 202.)

Mr. Richard H. Field. attorney in person, for appellant in No. 201, and appellee in No. 202.

[620] *Mr. William C. Scarritt*, with whom *Mr. John K. Griffith*, *Mr. Elliott H. Jones* and *Mr. Edward L. Scarritt* were on the brief, for appellee in No. 201, and appellant in No. 202.

MR. JUSTICE DAY, after making the foregoing statement, delivered the opinion of the court.

A motion was filed by the appellant to dismiss the appeal of the paving company, which was postponed to the hearing of these appeals upon the merits. An examination of the motion and a consideration of the briefs filed and arguments made in support of and in opposition to the same leads us to the conclusion that it cannot be sustained. The appellant

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appealed directly to this court; for while there was an allegation of diverse citizenship in the bill, jurisdiction was also invoked on the constitutional grounds above stated. This made the case appealable directly to this court under section 5 of the act of March 3, 1891, 1 Comp. Stat. U. S. 549, as one which "involves the construction or application of the Constitution of the United States."

The contention is that the prayer of the complainant on the constitutional grounds having been denied, the appeal of the respondent should have been to the Circuit Court of Appeals. But we cannot agree to this view. There was no cross bill filed in the case and none was required. The bill of complaint contained allegations sufficient to make a case of alleged violation of constitutional rights. It is well settled that in such cases the entire case may be brought to this court by the appeal. In *Holder v. Aultman*, 169 U. S. 81, 88, discussing the act of March, 1891, Mr. Justice Gray said:

"Upon such a writ of error, differing in these respects from a writ of error to the highest court of a State, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but [621] includes the whole case. *Whitten v. Tomlinson*, 160 U. S. 231, 238; *Penn. Ins. Co. v. Austin*, 168 U. S. 685." *Loeb v. Columbia Township Trustees*, 179 U. S. 472. See also *Chappell v. United States*, 160 U. S. 499, 509; *Horner v. United States*, No. 2, 143 U. S. 570, 577.

If, therefore, the whole case can come to this court by direct appeal under the allegations of this bill, and if all the questions, Federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and in this case the complainant appealing, a cross appeal may be sued out by the defendant as to the matters decided in the same case against him. If he fails to take such appeal the correctness of the decision as against him will be presumed. *Mail Company v. Flanders*, 12 Wall. 130; *Chittenden v. Brewster*, 2 Wall. 191, 196.

The motion to dismiss the cross appeal must be denied.

Coming to the merits of the case, the grounds of Federal relief will first be considered. It is claimed that certain sections of the act of the general assembly of Missouri, which make the tax bills levied to pay the contract price for the paving a lien upon the complainant's real estate, deprive him

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of his property without due process of law, and deny to him the equal protection of the laws. This argument is predicated on section 5989 of the Revised Statutes of Missouri.

The exact point of objection is that the improvement is not to be made if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, which privilege of protest is not given to non-resident owners, thereby discriminating against them. It is well settled, however, that not every discrimination of this character violates constitutional rights. It is not the purpose of the Fourteenth Amendment, as has been frequently held, to prevent the States from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all [622] persons similarly situated are treated alike in privileges conferred or liabilities imposed. *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Hayes v. Missouri*, 120 U. S. 68; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283; *Gulf, Colorado & Santa Fé Railroad v. Ellis*, 165 U. S. 150. The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject matter and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-residents whom it may be difficult to reach. Furthermore, there is no discrimination among property owners in taxing for the improvement. When the assessment is made it operates upon all alike. It has been held to be within the power of the legislature of Missouri to authorize the council to order the improvement to be made without consulting property owners. *Buchan v. Broadwell*, 88 Missouri, 31. If the legislature saw fit to give to those most directly interested and whose consent could be most readily obtained, the right to protest, such action did not deprive other persons of rights guaranteed by the Constitution.

Further objection on Federal grounds is urged, in that the specification of Trinidad Lake asphalt for this improvement is in violation of the interstate commerce clause of the Constitution of the United States, and of the so-called Sherman

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Act of July, 1890. The right to provide for this paving was vested by the Missouri statute in the board of aldermen. The right to select the material for the paving was vested in that body; they saw fit to choose Trinidad Lake asphalt for the paving. Their right so to do, under the charter powers of such cities as Westport, notwithstanding competitive bidding is thereby rendered impossible, has been sustained by the Supreme Court of Missouri. *Barber Asphalt Paving Co. v. Hunt*, 100 Missouri, 22; *Warren v. Paving Co.*, 115 Missouri, 572; *Verdin v. St. Louis*, 131 Missouri, 26. With the wisdom of this choice the courts have nothing to do, and in this case we are only concerned to inquire as to the alleged violation of Federal rights [623] in such selection. The argument is that Trinidad Lake asphalt, being a product of a foreign country and brought into Missouri, and there being other deposits in other States within the United States from which suitable asphalt could be had, the specification of this kind of asphalt is an interference with and a regulation of interstate commerce, in violation of the exclusive right of Congress conferred by the Constitution. It is unnecessary to cite largely from cases in this court, which hold that only such acts as directly interfere with the freedom of interstate commerce are prohibited to the States, *Kidd v. Pearson*, 128 U. S. 1, in which case, Mr. Justice Lamar, speaking for the court, said (p. 23):

"As has been often said legislation [by a State] may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution." *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, and cases cited in the opinion.

The right of a State in the exercise of the police power to make regulations which indirectly affect interstate commerce has been frequently sustained. In the present case it may be that the use of this kind of asphalt, under municipal authority conferred by the State, will in a limited degree affect interstate commerce, but it certainly is not one of those direct interferences with the power over and express control of the subject given by the Constitution to Congress. In this day of multiplied means of intercourse between the States there is scarcely any contract which cannot in a limited or remote degree be said to affect interstate commerce. But

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it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of Federal legislation.

The attempt to invoke the provisions of the Sherman Act in this case is equally unavailing. That act has been recently considered in the Northern Securities cases, decided at this term, and its construction and the nature of the remedies under it determined. It is not intended to affect contracts which have a remote and indirect bearing upon commerce [624] between the States. *Hopkins v. United States*, 171 U.S. 578; *Addyston Pipe Co. v. United States*, 175 U.S., 211.

In addition to the ground by which Federal jurisdiction was established in the courts below, it is alleged that the tax bills should be held void because they were obtained by undue influence of the agents of the paving company, improperly exercised to obtain the needed municipal action. The court below held, and an examination of the testimony has brought us to the same conclusion, that there was nothing in the case to establish the charges of fraud and corruption, although the record does show that an agent of the defendant company was active and perhaps influential in obtaining signatures to the petition which specified Trinidad Lake asphalt for this improvement; yet in the absence of proof of fraud or corruption we do not think the contract and resulting levies can be set aside for this reason. It is one thing to disapprove of such measures as a matter of propriety of action, but quite another to set aside a contract, especially after the full performance of its terms.

Upon the cross appeal, the learned judge in the court below held that the Wyandotte street tax bills were void, because that street had been previously paved with macadam in the years 1892-1893, four or five years before the asphalt paving was laid, which macadam he found to be in good condition, and but little worn. The effect of this decree was while finding against complainant as to the allegations of fraud and collusion in obtaining the contract, to hold that, in the opinion of the trial judge, the repaving of Wyandotte street was unnecessary. We think this conclusion overlooks the fact that the power to construct, improve and pave streets

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was vested by the law of Missouri, as it generally is, in the board of aldermen. (Laws of Missouri, 1895, 65, § 85 to § 95, inclusive.) The necessity of such improvements is a matter of which they are the exclusive judges, and their judgment is not to be interfered with by the courts, except in cases of fraud or gross abuse of power. This power of the city board is a continuing [625] one, and the mere fact that a pavement has been once laid does not require the interference of the courts when the governing body of the city, in the exercise of its judgment, has determined that the necessity for repaving has arisen. The law has vested this power in the representatives of the city and the courts are not at liberty to determine whether the judgment is exercised wisely or unwisely. If this were not so, a contractor, who acts under the direction and because of the action of the city authorities in determining the necessity of an improvement, must lose his compensation, if, upon the suit of a property owner, the courts shall take a different view of the necessity of the improvement. In other words, the contractor, though acting in good faith and complying in all respects with his agreement, lawfully made, must abide the judgment of the courts as upon appeal from the tribunal solely empowered by law to pass upon the necessity of the improvement, and to make the necessary contracts to carry it out.

As we have said, there may be cases of fraud or arbitrary abuse of power, when the courts will intervene. Under other circumstances the municipality and property owners interested are bound by the acts of their agents. The authorities amply sustain this view. 2 Dillon Mun. Corp. (4th ed.) § 686; *Wabash R. R. Co. v. Defiance*, 167 U. S. 88; *Skinker v. Heman*, 148 Missouri, 349; *Warren v. Paving Co.*, 115 Missouri, 572, 580.

Applying the principles settled by the authorities to the facts disclosed in this case, we do not find such evidence of fraud or gross abuse of power as would warrant the setting aside of the tax bills for this improvement. The testimony tends to show that the macadam was considerably worn; its replacement, to the extent of laying an asphalt pavement on top of it, was deemed necessary by the city authorities. It does not appear that any protest or objection was made dur-

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ing the progress of the work. A majority of the resident owners of lots abutting upon the part of the street to be improved had petitioned for the asphalt pavement. There is considerable [626] testimony tending to show that the value of abutting property was enhanced by the improvement. These and kindred matters were before the board. It is not our province to review their judgment, and we do not think the courts are authorized to interfere with the discretion vested in them in making the improvement under the circumstances shown. To hold otherwise would be, as we have said, to substitute the judgment of the court as to the expediency or necessity of making such improvement for that of the body delegated by law with the power and responsibility of action in the premises.

The court below, having properly held that the case alleged must fail on the other grounds, should have regarded the judgment of the board of aldermen as to the necessity of repaving Wyandotte street as conclusive upon it. The conclusion reached renders it unnecessary to consider whether the complainant, having failed to protest or object to the work before it was begun or during its progress, can be heard in a court of equity to object to the tax bills assessed for the benefit of the contractor after the work is completed in compliance with the contract.

We think the court below erred in adjudging the tax bills on Wyandotte street to be void, and so much of the decree is reversed with costs, the decree as to the other streets is affirmed, and the case remanded to the court below with instructions to dismiss the bill.

[633] D. E. LOEWE & CO. *v.* LAWLOR ET AL.^a

(Circuit Court, D. Connecticut. June 9, 1904.)

[130 Fed., 633.]

ABATEMENT—PENDENCY OF ACTION IN STATE COURT^b—INDEMNITY.—

The pendency of a suit in a state court cannot be pleaded in abate-

^a Motion to correct complaint denied (142 Fed., 216). See p. 854.

^b Pendency of action in state or federal court as ground for abatement of action in the other, see note to *Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Mtn. Co.*, 47 C. C. A. 205.

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ment of an action in a Circuit Court of the United States to recover treble damages under section 7 of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]) since the state court is without jurisdiction to enforce the remedy given by said section, and therefore the same case cannot be depending in both courts.^a

ATTACHMENT—GROUNDS FOR DISSOLUTION—PRIOR ATTACHMENT IN STATE COURT.—Where the state statute provides for successive attachments of the same property, a prior attachment in a state court affords no ground for the discharge of an attachment in a federal court.

At Law. On demurrer to plea in abatement, setting up *lis pendens* in state court, and on motion to vacate attachments.

Davenport & Banks, for plaintiff.

Bristol, Stoddard, Beach & Fisher, De Forest & Klein, and *Howard W. Taylor*, for defendants.

PLATT, District Judge.

It appears to be conceded that when suits are pending between the same parties for the same cause of action, and demanding the same relief, in the state and federal courts, which have concurrent jurisdiction in the same territory, and the federal jurisdiction is based upon diversity of citizenship, a plea in abatement alleging the pendency of one will be futile as against the other, upon the authority of *Gordon v. Guilfoil*, 99 U. S. 168, 25 L. Ed. 383, and many cases in line therewith in the lower courts.

The point is made in argument upon the plea herein that when diversity of citizenship is absent the reason for the rule departs.

To maintain in the case at bar that the state and federal courts are "in a sense" foreign to each other would require careful and conscientious study. The step from foreign relations to hostility is so easy to be taken, and the desire of the federal authority to promote and insure friendship and tranquillity by all honorable means is so great, that an unnecessary assertion of the inherent distinctions at-

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[634] taching to its source of power should be declared only in the last instance.

Fortunately, the case in hand does not, from the court's point of view, demand such exhaustive examination. In the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) the Congress has established a new method of obtaining redress in a matter relating to interstate trade, over which its jurisdiction is plenary. It has directed the parties to the Circuit Court for the vindication of their rights.

Before sustaining the defendants' plea, it is obviously necessary to accept their preliminary contention that the state court can, in the trial of the cause therein pending, invoke section 7 of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), and under its authority assess treble damages. It is not believed that such power exists in the state court. Congress was dealing with a delicate problem when it gave us the Sherman act, and it would seem to have been the thought that since a subject was up over which the federal jurisdiction was absolute it would be well to intrust its exploitation to the federal judiciary. The care exercised is plainly exhibited when equitable relief was provided for in section 4 (26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]), since such relief is further hedged about by the discretionary power afforded to the Attorney General.

The conclusion is easily reached. The same case is not depending in both courts. *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666.

Having gone to this point, it is unnecessary to take up in detail the question of attachments. The rule of comity cannot be invoked unless the situation here will lead to conflict with the state court. No trouble about the res can arise. The attachment liens will be governed by the rules applicable to successive attachments under the state statutes, which furnish the rule of action for this court, since no federal statute governs the matter.

The demurrer to the plea in abatement is sustained, and the motion to vacate attachments is denied, at defendants' costs in each event.

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[31] DAVIS ET AL. v. A. BOOTH & CO.^a

(Circuit Court of Appeals, Sixth Circuit. August 2, 1904.)

[131 Fed., 31.]

SALES—GOOD WILL—EQUITY—JURISDICTION—MULTIPLICITY OF SUITS.—

Equity has jurisdiction to restrain the violation of an agreement entered into as a part of the sale of a business, by which the persons interested therein agreed not to again engage in business in certain localities for a definite time, because of the difficulty in estimating the damages accruing, and to prevent a multiplicity of suits.^b

SAME—VALIDITY OF CONTRACT—PUBLIC POLICY.—An agreement by which the stockholders of a corporation, on selling its assets to complainant's assignor, agreed not to again engage in a similar business in specified localities for a period of 10 years, or do any act tending to impair the good will of the business sold, was not contrary to public policy.

SAME—ANTI-TRUST ACT.—Where a corporation engaged in the business of buying and selling fish sold out its assets and good will to plaintiff's assignor, and the seller no longer retained any interest in the property, so that the sale was not a mere combination of owners and properties under one management, the sale was not in violation of the federal anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], prohibiting contracts in restraint of trade, though the contract might incidentally or in some remote degree injuriously affect interstate commerce.

SAME—STATE STATUTES—CONSTRUCTION.—3 How. Ann. St. § 9354j, denominated an act prohibiting certain trust combinations, and providing that all contracts, the purpose or intent of which shall be in any manner to prevent or restrict free competition in the sale of any article or commodity, or in any other branch of business or labor, shall be utterly illegal and void, provided that it shall not invalidate or affect contracts for the sale of the good will of a trade or business, does not prohibit a contract for the sale of a business where it was not intended that the seller should thereafter have any interest in the property, or an agreement by which the seller's stockholders contracted not to again engage in a similar business in competition with the buyer in certain places for a specified time.

SAME—RESTRAINT OF COMPETITION.—An agreement ancillary to a sale of a corporation's business, by which the stockholders, who re-

^a Injunction granted (127 Fed., 875). See p. 318. Modified and affirmed by Circuit Court of Appeals, Sixth Circuit (131 F., 31). Petition for writ of certiorari denied by Supreme Court (195 U. S., 636). A memorandum decision. Not reprinted.

^b See Injunction, vol. 27, Cent. Dig. § 121.

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celved the purchase price, agreed that, in order to protect the good will of the business so sold, they would not either directly or indirectly engage in the same business within certain distinct limits for a period of 10 years, was not void, as an unreasonable restraint of competition in trade, at common law.

SAME—CONSTRUCTION.—Where a contract ancillary to the sale of a business provided that the stockholders of the seller would not again engage in a similar business [32] for a period of 10 years in the territory, or the immediate vicinity of the territory, dealt in by the corporation, or operated in by it or its agents, or the immediate vicinity of such territory, the localities guarded against were restricted to those in which the selling company had establishments for doing business, and the immediate vicinity thereof, and did not include all parts or every one of the United States in which a former customer resided, or into which the corporation's correspondence had extended, or through which an agent of the company had traveled.^a

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

For opinion below, see 127 Fed. 875.

Edward E. Kane and *Fred A. Baker*, for appellants.

Henry M. Duffield and *Charles S. Thornton*, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge.

The object of this bill filed in the Circuit Court by the appellee, A. Booth & Co., was to obtain an injunction against the appellants to restrain them from violating an agreement made by them with William Vernon Booth, to the benefits of which the appellee claimed to be entitled. It states: That the complainant is a corporation organized under the laws of Illinois on August 1, 1898, with a capital of \$5,500,000, for the purpose of buying, catching, and selling fish, and having its general office at Chicago. That the Davis Fresh & Salt Fish Company was a corporation organized under the laws of Michigan for a similar business, with headquarters at Detroit. That on or about August 14, 1898, the last-named company, for the consideration of \$17,473.14, sold all its properties, including the good will of its business con-

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ducted at Detroit, and gave a bill of sale, with warranty of title, to William Vernon Booth, on September 14, 1898, and Davis gave a personal guaranty of the contract of sale. That, as an inducement to the sale, Davis and the other stockholders of the selling company entered into the following agreement:

"This instrument witnesseth, that William Vernon Booth has purchased the plant, business and good will of the business of the Davis Fresh & Salt Fish Co., and has paid therefor the sum of \$17,473.14; that in making said transfer, and as an inducement to said William Vernon Booth to purchase said plant, business and good will and pay the sum aforesaid for the same, we each have agreed that we would not, and we now do agree, each for himself, jointly and severally with him, the said William Vernon Booth, his heirs and assigns, forever, that we will not, during the next ten years, in the territory or the immediate vicinity of the territory dealt in by our company, or operated in by ourselves or the agents or employees of the company engage or in any manner be interested in, either directly or indirectly, for ourselves or for others, the same or like kind or character of business as that heretofore conducted and now being carried on by said company, its officers, agents, employees and assigns, and that we will not, during the said period of ten (10) years, either directly or indirectly, be guilty of any act interfering with the business, its good will, its trade or its customers, or come in competition with the same; and we will not, jointly or severally either in firms or corporations, or as individuals or in any other way, directly or indirectly interfere with the said trade or business, or do any act prejudicial to the same or any part thereof, or interfere with the persons employed therein; the meaning hereof being that the said William Vernon Booth is buying and paying for the good will of the business in the largest and fullest scope of the term; and that we will not, and each agrees that he will not, do anything to interfere [33] with or injure the said business, but will, during said period, lend his aid and best influence to the promotion and advancement of the same.

"In witness whereof, we hereunto subscribe our names and affix our seals, jointly and severally, this first day of August, A. D. 1898.

"EDGAR A. DAVIS.

"JAMES T. DONALDSON.

"BELLE R. HARPER.

"ED. E. KANE.

"BELLE B. DAVIS."

Which agreement was delivered and the consideration of \$17,473.14 paid on September 14, 1898, and said consideration was then distributed among the stockholders of the selling company. That on September 27, 1898, said William Vernon Booth, for a valuable consideration, sold to the complainant all the properties so purchased of the Davis Fresh & Salt Fish Company, including the good will of the business, and assigned to said complainant the above-quoted agreement of the stockholders of said last-mentioned company. That at the time of its sale to William Vernon Booth the Davis Fresh

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& Salt Fish Company was conducting its business not only at Detroit, but in the following named places—either selling to regular customers, or having established agencies there—namely: “Cincinnati, Cleveland, Columbus, and Dayton, in the state of Ohio; Louisville, Kentucky; Nashville, Tennessee; St. Louis and Kansas City, Missouri; Buffalo and New York City, in the state of New York; Grand Rapids, Jackson, East Saginaw, Battle Creek, Lansing, and Port Huron, in the state of Michigan.” That Davis became an employé of the complainant, but after a time withdrew, and with Delos Cook, Michael J. Dee, and Alva M. Hungerford organized a limited partnership under the laws of Michigan, and filed a certificate thereof in the office of the clerk of the county of Wayne, in that state. That on August 26, 1898, the complainant made a similar purchase of the E. A. Edson Company, an Ohio corporation doing a similar business at Cleveland, and also at Detroit, and that Edson, its president, made a similar agreement with that of the stockholders of the Davis Fresh & Salt Fish Company, and that it made a like purchase of the Buffalo Fish Company, a New York corporation, and obtained a similar agreement from its stockholders. That Davis, after leaving complainant, organized the Gopher Fish Company in opposition to complainant, at St. Paul, Minn., and induced Donaldson, who was one of the signers of the agreement of the Davis Fresh & Salt Fish Company stockholders, who was subsequently in the employment of the complainant, to take charge of the said Gopher Fish Company, and also induced Hungerford, another of said signers, to leave complainant and become bookkeeper of the Wolverine Fish Company. That Davis and Edson made public announcement that they intended to “fight complainant in a business way,” and intended to organize corporations in Detroit, Cleveland, New York and other places, which should be under one control, and act together in business policy, and fix prices for the purchase and sale of fish, whereby they could better promote the interests of the public, and that they caused to be published in leading journals articles (which are copied into the bill) indicating that they intended to carry on, or cause to be carried on, a strong competition with the complainant in [34] the fish business.

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That they characterized the complainant as a "trust," the contrary of which the complainant avers to be the fact, and it vouches a decision of the Supreme Court of New York to that effect. That Davis, Edson, and another have entered actively into the fish business in the territory, and the vicinity of the territory, dealt in by their respective corporations, in violation of their agreements, and organized companies to prosecute said business at New York, Cleveland, and Detroit. That the Wolverine Fish Company was organized by Davis to more conveniently violate his agreement, and has been and now is conducting and threatens to conduct its business in a manner calculated to injure the complainant, and render the good will purchased of his company valueless. That he interferes with its business, trade, and customers. That he solicits consignments of fish and makes purchases thereof from the former customers of his company, and has in many instances drawn away such customers to the Wolverine Fish Company, and that Edson, Hungerford, and Dee are assisting him. That Davis is sending out to the former customers of his company false statements injurious to the complainant's reputation for honesty and fair dealing, which tend to the loss of complainant's business, and that Davis is insolvent, and a judgment against him would be uncollectible; and a considerable number of the statements referred to are set out, the truth of which is denied. And the complainant says it has been greatly injured by this conduct of the defendants, and has sustained already the loss of more than \$100,000, and will continue to suffer further irreparable loss unless the defendants are enjoined, etc.

The prayer is that the defendant Davis be compelled to perform his agreement made with William Vernon Booth, and that he—

"And his agents and employes be enjoined during the full term of ten years from August 1, 1898, from engaging or in any manner being interested, directly or indirectly, for themselves or for others, in the city of Detroit, or in the immediate vicinity of any territory dealt in on or prior to August 1, 1898, or operated by the said Davis Fresh & Salt Fish Company, or the defendant Davis, or the agents or employes of the Davis Fresh & Salt Fish Company, in catching, buying, selling, handling, or dealing in any kind of fish or other salt or fresh water food products, in the storage thereof, the manufacture of, or dealing in any manner in fish products, and from engaging in or in any manner being interested in, in the territory aforesaid, any other kind or char-

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acter of business, the same as or like that conducted and carried on by the Davis Fresh & Salt Fish Company on and prior to August 1, 1898, or by its officers, agents, employés, or assigns, and from soliciting or inviting, in the territory aforesaid, other persons to buy from or sell to or otherwise deal with them, or either of them, in said business aforesaid, and from interfering with the business formerly transacted by the Davis Fresh & Salt Fish Company, and by it sold, assigned, and transferred to William Vernon Booth, its good will, its trade, or its customers, and from coming into competition with this complainant's business in the city of Detroit and vicinity, and wherever the business of the Davis Fresh & Salt Fish Company extended at the time of its sale to and contract with said Booth, and from interfering in any way, directly or indirectly, with the said trade or business, and from doing any act prejudicial to the same, or any part thereof, and from interfering with the persons employed in the service of this complainant, and from using their aid or influence in regard to this complainant's trade or business, otherwise than for the promotion and advancement of the same, and that the said defendants Eugene R. Edson, Alva M. Hungerford, Michael J. Dee, and Wolverine Fish Company, Limited, their agents, servants, and employés, be enjoined during the full period of ten years from August 1, 1898, from aiding the said Edgar [35] A. Davis or participating with said Davis in and otherwise, directly or indirectly, interfering with the business of the complainant, or with the persons employed therein, and from using their aid and influence in connection with the said Davis, otherwise in regard to complainant's trade or business, otherwise than for the promotion and advancement of the same, and that the said Edgar A. Davis, Eugene R. Edson, Alva M. Hungerford, Michael J. Dee, and the Wolverine Fish Company, Limited, be so enjoined and restrained during the pendency of this action; and that this complainant recover from the said defendants such sum as, upon a proper accounting, the complainant may show it has been damaged by reason of the wrongful action of the said defendants, and for such other and further relief as to the court may seem fit."

Many affidavits and exhibits were attached to the bill in support thereof. We have stated the contents of the bill with considerable fullness, in order to show the scope of the controversy.

The complainant moved for a preliminary injunction. All the defendants except Edson, who was not served or did not appear, answered the bill, and filed a large number of affidavits of other persons in opposition to the motion—so many that we cannot take space to array them. It is sufficient to say that the answers and affidavits raise a conflict of proof in reference to several of the matters stated in the bill and the affidavits accompanying it. The arguments made here, in the main, proceeded upon the broader aspects of the controversy. Besides, having regard to the practice which obtains in this class of appellate proceedings, we should not go into a nice balancing of proof or estimate of particulars. This being an appeal from an order granting

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a preliminary injunction, unless we should see that the court below had fallen into a positive mistake in regard to some important fact, we should not disturb its findings, and it is not claimed that such a mistake has happened. The court below granted this preliminary injunction by the order following:

"Now, therefore, we strictly command and enjoin you, the said Edgar A. Davis, your attorneys, solicitors, clerks, servants, and agents, under the penalties that may follow on you in case of disobedience, that you forthwith, and until the further order of this court, desist from engaging or in any manner being interested, directly or indirectly, for yourself and for others, in the city of Detroit, or in the immediate vicinity of any territory on or prior to August 1, 1898, dealt in or operated by the Davis Fresh & Salt Fish Company, described in the bill of complaint in this cause, or the defendant Davis, or the agents or the employes of the said Davis Fresh & Salt Fish Company, in catching, buying, selling, handling, or dealing in any kind of fish, or other salt or fresh water food products, in the storage thereof, the manufacture of or dealing in any manner in fish products, and from engaging in, or in any manner being interested in, in the territory aforesaid, any other kind or character of business, the same as or like that conducted and carried on by the Davis Fresh & Salt Fish Company on and prior to August 1, 1898, or by its officers, agents, employes, or assigns, and from soliciting or inviting, in the territory aforesaid, other persons to buy from or sell to or otherwise deal with you or the Wolverine Fish Company, Limited, or either of them, in said business aforesaid, and from interfering with the business formerly transacted by the Davis Fresh & Salt Fish Company, and by it sold, assigned, and transferred to William Vernon Booth, its good will, its trade, or its customers, and from coming into competition with this complainant's business in the city of Detroit and vicinity, and wherever the business of the Davis Fresh & Salt Fish Company extended at the time of its sale to and contract with said Booth, and from interfering in any way, directly or indirectly, with the said trade or business, and from doing any act prejudicial to the same or any part thereof, and from interfering with the persons employed in the service of this complainant, and [36] from using your aid or influence in regard to this complainant's trade or business, otherwise than for the promotion and advancement of the same. And now, therefore, we strictly command and enjoin you, the said Alva M. Hungerford, Michael J. Dee, and the Wolverine Fish Company, Limited, your attorneys, solicitors, clerks, servants, and agents, under the penalty that may follow in case of disobedience, that you are forthwith and until the further order of this court to desist from aiding the said Edgar A. Davis, or participating with said Davis in, directly or indirectly, interfering with the business of the complainant, or with the persons employed therein, and from using your aid and influence in connection with the said Davis or otherwise in regard to complainant's trade or business acquired under the said contract, otherwise than for the promotion and advancement of the same."

The defendants appeal from this order.

1. It is assigned as error that the court held the bill of complaint to state a case entitling the complainant to relief by injunction; and it is argued that the proper remedy is by

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an action at law, and further that public policy is opposed to the enforcement of such contracts. With regard to the objection that there is a remedy at law, it is quite clear that the difficulty in estimating the damages in such a case, and the succession of causes of action and the multiplicity of suits likely to ensue, furnish ample reasons for the exercise by a court of equity of its power to restrain the continuance of the supposed wrongdoing. And if the contract is not one which should be held by the court unlawful as opposed to public policy, there is no sufficient reason for withholding relief. We are referred to the case of *Bensley v. Texas & Pac. Ry. Co.*, 191 U. S. 492, 24 Sup. Ct. 164, 48 L. Ed. 274, as conclusive of the validity of this objection. A railroad company had entered into a contract that it would not establish another depot within three miles of one agreed to be built upon the plaintiff's land. Upon a bill filed to restrain the company from establishing a depot within that distance, as ordered by the State Railroad Commission, it was held that the injunction should not be allowed. The decision was rested upon the ground that the railroad company was by reason of its charter bound by a public duty in regard to the location of its depots, which it ought not to be permitted to disable itself from performing. In the present case the parties to the contract were private parties, upon whom no public duty was imposed, other than such as rest upon all private individuals. The ground upon which the decision cited was based is wholly absent here. In the case of *Norcross v. James*, 140 Mass. 188, 2 N. E. 946, the contract sought to be enforced was a merely personal covenant, and did not run with the land subsequently conveyed to the defendant. Whether the contract in question is void in law, upon the ground that it is in restraint of trade or competition in trade, is a question which will be discussed further on.

2. One of the principal grounds upon which it is urged for the appellants that the agreement in question is void is that it was an agreement in restraint of trade, in violation of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. But that act, as was held in *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, is leveled against contracts which have a direct rela-

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tion to interstate commerce, and does not extend to contracts which may incidentally or in some remote way come into relation with, or become the source of, interstate traffic. In that case a New Jersey [37] corporation, being already in control of a large majority of the sugar refineries in the United States, acquired the control, by a purchase of their stock, of four Philadelphia refineries, and the question was whether such an acquisition was a violation of the anti-trust act. It was not doubted that the sugar refined there would, to a large extent, at least, become the subject of interstate traffic, but such traffic was not the subject directly involved. We think there is nothing in the anti-trust act which rendered unlawful the purchase by William Vernon Booth and his transfer, to A. Booth & Co., of the plant of the Davis Fresh & Salt Fish Company, or which necessarily rendered invalid the agreement of the stockholders of the latter company, which was ancillary to the contract of sale. Nor can this conclusion be affected by the fact that A. Booth & Co. also purchased other plants and stocks to an extent that tended to create a power to monopolize the fish market. There is a clear distinction, which seems to be lost sight of in the argument here, between the aggregation of properties by purchase when the seller no longer retains an interest in the property, and a combination of owners and properties under one management, where each owner's interest is continued in the combination. To this latter class belongs the case of *Merz Capsule Co. v. United States Capsule Co.* (C. C.) 67 Fed. 414, affirmed in 71 Fed. 787. It may be that the practice of acquiring by a single corporation, through purchase of a great number of single plants in several states, of power to control the market of a given commodity in a wide area of territory, may become injurious to the public; but, if so, it would seem that the limitations and the means for the restriction and correction required must be supplied by the lawmaking power, since the old law against forestalling the market has become obsolete. It is possible that it may be developed at the final hearing that interstate traffic may be directly involved in this agreement. But if so, it will be prudent to postpone final decision in respect to the consequences thereof upon the validity of the agreement until the

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case is presented upon full proof, rather than by ex parte affidavits as now.

3. It is further contended that the contract was rendered void by the statute of Michigan of 1889, which enacted that:

"All contracts * * * the purpose, object or intent of which shall be * * * in any manner to prevent or restrict free competition in the sale of any article or commodity produced by mining, manufacture, agriculture or any other branch of business or labor, shall be utterly illegal and void * * * provided, however, that this section shall in no manner invalidate or affect contracts for what is known and recognized at common law and in equity as contracts for the good will of a trade or business."

But that act contained a proviso excepting certain classes and subjects which rendered it of doubtful constitutionality. Such legislation was held void in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, and the Michigan statute was amended in 1899, which was after this transaction, so as to remove the objection. The act of 1889 is denominated in 3 How. Ann. St. § 9354j, as one prohibiting "certain trust combinations," and we have no doubt it was intended for such cases. We think that the intent which made the contract or combination unlawful was one in which both parties participated, and that the act was not intended to comprise a case where there was a sale [38] and purchase of property, after which the seller should have no interest in the property, and therefore would have no intent as to its further use. The act of 1899 is subject to the same construction, but, as it would not render unlawful a contract which had been lawfully made, we need not consider it further.

4. But finally it is insisted that the stipulation in question contained in the agreement of date August 1, 1898, is void at common law, for the reason that it is an unreasonable restraint of competition in trade. The agreement was ancillary to the contract of sale made by the Davis Fresh & Salt Fish Company, in which these stockholders had the entire interest, and of the fruits of which sale they were the beneficiaries. That contract expressly included the good will of the business of the seller, and the stipulation of the stockholders was made, as it recites, to induce the sale; and it was for the protection of the vendee in the enjoyment of it, and, as it seems to us, would pass by the transfer of the

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property, business, and good will to William Vernon Booth's vendee, to whom the agreement was also assigned. The question of the reasonableness of such a stipulation is one which was elaborately discussed by Judge Taft in delivering the opinion of this court in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122. It would be useless to reiterate the grounds and reasons upon which it was held that such a stipulation is valid if it goes no farther than to support and protect the interests transferred by the contract of sale. If tested by this rule alone, we think this stipulation should be held valid and obligatory.

But referring again to the distinction already alluded to between an aggregation effected by purchase, and a combination of several owners to pool their business and eliminate competition, it is to be observed that in the present instance it appears that the purchase price paid to the Davis Fresh & Salt Fish Company consisted partly of cash and partly of stock in the corporation or A. Booth & Co., and that therefore the transaction was of a mixed character. This is an aspect of the case which has given us most concern, and in respect of which we are not aware of any decision precisely in point. We are unwilling to decide a matter of so much importance at this preliminary stage of the case, and especially so because no particular attention has been given to it in the briefs and argument of counsel. We purpose, therefore, to give such directions in regard to the continuance of the injunction as will preserve the rights of parties from serious impairment in the interim, and reserve this and another question reserved in another part of this opinion until final hearing.

There are no other questions which seem to require independent discussion, except one which relates to the scope of the injunction awarded by the court below. We are of opinion that the proper construction of the agreement given by the stockholders of the Davis Fresh & Salt Fish Company requires that the description of the localities in which their stipulations should be operative, stated in the writing at the beginning of said stipulations, extends to and qualifies all of them, and that such localities are restricted to those in which the company had establishments for doing business,

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and the immediate vicinity thereof. It could not mean all parts or every one of the United States in [39] which a former customer resided, or into which its correspondence had extended, or through which some agent of the company had traveled. No definite or reasonable bounds are indicated by the contract, other than those which we have indicated. Besides, the inclusion made by the words "or the immediate vicinity of the territory," etc., implies some place from which the "immediate vicinity" is to be estimated, and excludes the idea of reckoning from some indefinite point. The ordering part of the injunction directed to the Wolverine Fish Company is also too broad, when, in addition to forbidding certain conduct in conjunction with Davis, it proceeds to forbid that company from doing such things "otherwise." The Wolverine Fish Company was a stranger to the Davis agreement, and, as to anything in which he should not participate, it was not affected thereby. The injunction should be modified accordingly. We think, also, that the complainant should be required to give bond to indemnify the defendants from damages arising from the issuance of the writ, in case the bill should not be finally sustained, as a condition to the continuance of the injunction.

With these modifications, the order of the Circuit Court is affirmed. The costs of this appeal will be divided.

[182] ELLIS v. INMAN, POULSEN & CO. ET AL.

(Circuit Court of Appeals, Ninth Circuit. June 6, 1904.)

[131 Fed., 182.]

MONOPOLIES—ANTI-TRUST LAW—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.—In determining whether or not a combination is in violation of the federal anti-trust law, as in restraint of interstate commerce, it is immaterial that such is not its ultimate object, which is in most cases to increase the trade and profits of the parties to such combination; nor is it material to ascertain what proportion the resulting restraint of interstate commerce bears to other results. The true inquiry is whether it tends directly to appreciably restrain interstate trade, and, if it does, it is within the statute, although such effect may not be so considerable as its other effects.

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SAME.—A complaint alleged that plaintiff was a builder doing business in Portland, Or.; that in such business he purchased large quantities of rough lumber from mills located at Vancouver, Wash., which was seven miles from Portland, but that such mills did not manufacture finished or kiln-dried lumber; that defendants, who comprised all the manufacturers and dealers in Portland, combined to fix exorbitant prices on all lumber sold by them, and to compel all consumers in Portland to pay such prices by refusing to sell any finished lumber at any price to such consumers as bought lumber of any kind from other dealers, except on condition that such consumer pays to defendants the difference between the price he paid for lumber so bought from others and the price charged therefor by defendants and promises to buy all his lumber thereafter from defendants; that the purpose and effect of such combination was to prevent plaintiff and other consumers from buying lumber at Washington mills, and to obtain a monopoly of the trade in Portland at unreasonable and exorbitant prices. *Held*, that the combination charged constituted a violation of the federal anti-trust act, its effect being to directly restrain interstate commerce, and that the complaint stated a cause of action thereunder for the recovery of damages alleged to have resulted to plaintiff.^a

In Error to the Circuit Court of the United States for the District of Oregon.

For opinion below, see 124 Fed. 956.^b

[183] The plaintiff in error brought an action against the defendants in error under the provisions of the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies," to recover damages resulting from a combination of the defendants in error to prevent him from purchasing lumber in the city of Vancouver, Wash., to be used in the city of Portland, Or. The substantial averments of the complaint are as follows: That the plaintiff in error is engaged in the business of constructing houses and other buildings in the city of Portland and selling the same for profit, and in the business of constructing such buildings on contracts with his customers; that the defendants in error are engaged in the business of manufacturing and selling both rough lumber and seasoned or kiln-dried lumber at Portland, Or., and that they are the only manufacturers of such lumber in or adjacent to said city who sell lumber therein; that there are persons engaged in the business of manufacturing and selling rough lumber at the city of Vancouver and at other points in the state of Washington, and that, until interfered with by the acts and combination of the defendants in error, the plaintiff in error could and did purchase at and import from the city of Vancouver large quantities of lumber for use in his business at Portland; that, in order to carry on his said business, it is necessary for him to purchase and use large quantities both of

^a Syllabus copyrighted, 1904, by West Publishing Co.

^b See p. 268.

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rough lumber and of seasoned or kiln-dried lumber; that the mills at Vancouver produce only rough lumber, and that the seasoned or kiln-dried lumber required by the plaintiff in his business can only be procured from the defendants in error, and he is absolutely dependent upon them for his supply thereof; that on July 2, 1902, the other defendants in error organized the defendant City Retail Lumber Company, and for the purpose and with the intent of creating a monopoly of the manufacture and sale of lumber for local use in the markets of the city of Portland, and of controlling and restricting the output of lumber from defendants' said mills, and fixing and controlling the price of lumber in said Portland market, and arbitrarily advancing said price and demanding and receiving excessive and unreasonable prices for the lumber manufactured and sold by them, and preventing the shipment of lumber by the said manufacturers in the state of Washington from said state to the city of Portland, and preventing the sale in the city of Portland of lumber manufactured in the state of Washington, and preventing the plaintiff in error and all other contractors and builders in Portland from purchasing lumber from any dealers other than the defendants, and particularly from said manufacturers in the state of Washington, did conspire, confederate, and agree together that they would sell lumber in the Portland market only through said City Retail Lumber Company at prices to be fixed by it and to persons to be designated and approved by it; that thereafter the entire sales of lumber in the Portland market from all the defendants in error were placed in the control of said City Retail Lumber Company for the purpose and with the intent of preventing the plaintiff in error and other contractors and builders in Portland from purchasing lumber from said manufacturers in the state of Washington, and that the defendants in error further conspired and agreed to adopt such means and prescribe and enforce such burdens and penalties as might be necessary to carry out said purpose, and thereby enable them to fix a price on lumber in the city of Portland, and control the output and sales of lumber therein; that to carry out said purposes the defendants in error have employed agents to watch the construction of all buildings in the city of Portland, and ascertain the sources from which lumber used therein is procured, and to report to the City Retail Lumber Company all buildings for the construction of which any lumber was procured from said manufacturers in the state of Washington, and that upon such report the defendants in error would refuse to supply any lumber upon any terms to such contractor, builder, or other consumer who purchased any lumber for use in Portland from said manufacturers in the state of Washington, and have refused to sell any lumber to such contractor, builder, or other consumer, except upon the condition that he pay them, in addition to the price charged by them for lumber required from them, the difference between the price he paid for the lumber so purchased in the state of Washington and the price then charged by them [184] for the same quantity of similar lumber, and the further condition that he promise them to purchase no more lumber from said manufacturers in the state of Washington, and that in all cases where the contractor, builder, or other consumer had procured a sufficient supply of rough lumber from manufacturers other than the defendants in error, and bought from manufacturers in the state of Washington, the defendants in error have refused to sell any finished, seasoned, or kiln-dried lumber to such contractor, builder, or other consumer, except upon his making such payment and such promise; that by these means the defendants in error have compelled all contractors and builders in Portland to cease buying lumber from the mills in the state of Washington, and have been enabled to and do control the

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output of lumber sold in the market in Portland, and have fixed extortionate prices therefor; that in March, 1903, in the course of his business, the plaintiff in error purchased from a manufacturer in Vancouver, Wash., and had shipped to and delivered to him at Portland, a large quantity of rough lumber at a price of \$250 less than was then charged by the defendants in error for the same quantity of like lumber in Portland, and the plaintiff used the same in the construction of buildings; that on March 20, 1903, he required for use in the construction of said buildings large quantities of finished and seasoned or kiln-dried lumber, and was and has been unable to procure the same from any manufacturer or dealer other than the defendants in error, and that on or about that date he applied to the defendants in error to purchase such lumber, to wit, about 7,000 feet of flooring, about 7,000 feet of ceiling, and about 9,000 feet of rustic, which lumber was so needed by him in his business, and offered to pay them therefor the regular price charged by them for the same, but that because of his purchase of lumber at Vancouver, Wash., the defendants in error refused to sell him said or any lumber upon any terms, and so refused for a period of two months, and still refuse, unless the plaintiff in error pay them, in addition to the prices charged by them for the lumber which he wished to purchase from them, the sum of \$250, the difference between the price he paid for lumber in Vancouver and the price they charged for the same quantity and quality at Portland, and unless, in addition thereto, he promise them in the future to purchase no lumber from any manufacturer or dealer in the state of Washington; that the plaintiff in error refused to comply with said conditions, and was unable to procure any lumber from the defendants in error; that at all the times mentioned in the complaint the defendants in error have had on hand and for sale in the city of Portland ample supplies of lumber of the quantity and kinds that the plaintiff in error required, and during all said time the plaintiff in error has been ready and able and has offered to pay therefor the regular prices charged by the defendants in error, but they have so refused to sell the same in pursuance and furtherance of their conspiracy, and for the purposes and with the intent above stated, and for the reason that the plaintiff in error had purchased lumber from said manufacturers in the city of Vancouver, and for the purpose and with the intent of preventing him from purchasing lumber from said manufacturers in the city of Vancouver and forcing him to purchase the same from the defendants in error, and for the purpose of punishing and injuring him for having made such purchase in Vancouver, and not for any other reasons. The plaintiff in error alleged that he was damaged in the sum of \$7,000 through his inability to continue his business and through loss of profit on his business during the building season of 1903, and the loss of custom and good will of his said business; in the sum of \$500 through the delay caused in the construction of two certain buildings and from being compelled to use unseasoned and inferior lumber in their construction; in the sum of \$1,000, caused by delay in the construction of a certain building which he had contracted to build for the price of \$4,000, and by the exposure of said building to the rains, and by being required to use unseasoned and inferior lumber in finishing the same, and by being unable to secure payment on his contract on that account; in the sum of \$25 through being compelled by reason of said combination to purchase in the month of April, 1903, rough lumber from them at their own price, which was \$25 in excess of the cost of the same lumber if purchased in Vancouver and shipped therefrom to Portland. The defendants in error filed demurrers to the complaint on the ground [185] that it did not state facts sufficient to

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constitute a cause of action. The demurrers were sustained, and the complaint was dismissed, with costs to the defendants in error. To review that judgment the plaintiff in error has sued out this writ of error.

Veazie & Freeman, for plaintiff in error.

Cake & Cake, for defendants in error Inman, Poulsen & Co.

Wm. D. Fenton, for remaining defendants in error.

Before GILBERT and Ross, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question presented is whether the complaint states a cause of action. It alleges that an interstate trade in lumber had existed between purchasers in the city of Portland, in the state of Oregon, and manufacturers at Vancouver, in the state of Washington, about seven miles distant from Portland, and that the defendants in error, who constitute all the manufacturers of lumber in the city of Portland, formed a combination for the purpose of preventing the importation of lumber from the state of Washington for use in Portland, and that they adopted means such as to accomplish their purpose. It is contended by the defendants in error: First. That the combination does not operate directly upon the manufacture, sale, or transportation of an article of interstate commerce; that it only incidentally and collaterally relates to or affects the sale and transportation of lumber from another state, and that it is therefore not within the prohibition of the act. Second. That the injury complained of by the plaintiff in error was not the direct or unavoidable result of an illegal combination, but that such injury, if any, resulted from the refusal of the defendants in error to deal with the plaintiff in error except upon terms acceptable to them. The interpretation of the statute applicable to the case is found in *Anderson v. United States*, 171 U. S. 615, 19 Sup. Ct. 54, 43 L. Ed. 300, in which it was said:

"Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where

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the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. * * * If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good; otherwise there is scarcely any agreement among men which has interstate or foreign commerce for its subject that may not remotely be said to in some obscure way affect that commerce, and to be therefore void."

Also, in *United States v. Joint Traffic Association*, 171 U. S. 568, 19 Sup. Ct. 31, 43 L. Ed. 259, where it was said:

"The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate [186] business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

Does the combination which is set forth in the complaint in the present case tend directly to restrain interstate commerce? The complaint alleges that such was its purpose, and that such is its effect. Notwithstanding these allegations, however, it is clear that, if it can be seen from the facts set forth that the restraint is only indirect and incidental, no cause of action is stated within the intendment of the act. But it is equally clear that the distinct allegation of the purpose of such a combination may be taken into consideration in connection with the facts alleged. If it be true that the purpose of the defendants in error was as alleged, how can it be said of any means which they adopt to effectuate the purpose that they accomplish it only indirectly and incidentally? It is true that the complaint alleges the existence of another purpose—the purpose to obtain excessive and unreasonable prices for lumber; but one of the purposes alleged in attaining that end is the purpose of shutting off the Portland trade in Washington lumber. In determining whether or not the restraint of trade is the direct and necessary result of the combination, no assistance is to be found by pursuing the inquiry further and ascer-

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taining whether its main purpose and chief effect are to foster the trade and increase the business of those engaged in it. It may be conceded that the main purpose of all such combinations is to foster the trade and increase the profits of those who are engaged in them, that the restraint of interstate trade as such is not their ultimate object, and that the effect of the combination on interstate trade is to the members of the combination an immaterial matter. Nor is it material, we think, to inquire what is the chief effect of the combination? The true inquiry is, does it tend directly to appreciably restrain interstate commerce? It is not material to ascertain just what proportion the resulting restraint of interstate commerce bears to other effects or results of the combination. Nor is the court called upon to weigh the effects, or to determine that, if the effect in restraining interstate trade is not so considerable as other effects, the combination is not forbidden. In the case of *W. W. Montague & Co. v. Lowry et al.*, 24 Sup. Ct. 307, 48 L. Ed. 608, in which the Supreme Court very recently affirmed the judgment of this court, a combination was made between certain dealers of tiles, mantels, and grates in the cities of San Francisco, Sacramento, and San José, who were members of an association formed for the purposes of the combination, and all of the manufacturers of such articles in the other states of the Union. By the terms of the agreement the manufacturers bound themselves not to sell goods in San Francisco, or within a radius of 200 miles therefrom, to any one who was not a member of the association. There was no manufacturer of such goods in California. The plaintiffs who brought the action were dealers in tiles, but not members of the association. They were unable to purchase goods of the manufacturers. The only restraint on trade was that which resulted from the inability of the plaintiffs to buy goods on equal terms with members of the association for use at their place of business in San Francisco. It could not be [187] demonstrated in that case that by reason of the agreement the total amount of interstate trade would be at all diminished. But the Supreme Court held that it was sufficient if it could be seen that the tendency of the combination was such as to diminish such interstate trade. Said

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the court, "The amount of trade in the commodity is not very material."

The defendants in error admit that the business of importing lumber from the state of Washington into the city of Portland may be affected by the combination; but they say that the result is due, not to their combination to refuse to sell to purchasers in the city of Portland who make such importations, but to the inability of the Washington mills to supply the Portland market with kiln-dried or finishing lumber; and that the combination is not the direct and proximate cause of the inability of the Washington mills to sell lumber in the city of Portland. But that very inability is one of the essential facts which aid to create the situation which is complained of. It is a fact conceded to exist, and it is taken advantage of by the defendants in error. But for the existence of that fact, it is safe to assert that the combination would not have been formed. The facts must be reckoned with as they are found. Can it be said that the absence of factories and plants outside of the combination capable of producing finishing lumber so as to compete with the defendants in error shall relieve them from responsibility for their acts? Does the fact that the whole combination and its success are made possible by the adventitious circumstance that no one has yet seen fit to invest the capital necessary to establish a competing plant at Vancouver render the restraint of interstate commerce effected by the combination any the less direct and necessary? If such is the law, it follows that, to secure immunity for every such combination, it is necessary only to bring into it all manufacturers of its line of goods, and to intrench it behind the proposition that the resulting restraint of trade comes, not from the combination, but from the inability of others to supply the market. The mere statement of the proposition is its refutation. With equal reason it might have been urged in the *Montague Case* that the restraint of interstate trade was owing, not to the combination, but to the fact that there was no independent manufacturer of tiles from whom the plaintiffs in that case could purchase.

The opinion of the trial court in sustaining the demurrers seems to have been largely influenced by the argument that

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if the defendants in error, instead of combining to advance prices and to refuse to sell to certain purchasers, had combined to reduce the prices of all kinds of lumber to all purchasers, it would have had an equal tendency to destroy the trade in lumber between Vancouver and Portland, and yet in so doing the defendants in error could not have been accused of acting unlawfully in restraint of that trade. But is this argument sound, and does it lead to the conclusion which was reached by the court? We submit that a combination which is made for the specific purpose of restraining interstate trade and which accomplishes that purpose, restrains it directly, and that, if such be its intention and its direct tendency, it is under the ban of the act, whether it include an agreement to raise prices or an agreement to lower them. The mere agreement to raise or lower prices, as was said by the court in the *E. C. Knight Case*, 156 U. S. 16, [188] 15 Sup. Ct. 255, 39 L. Ed. 325, might tend to restrain external trade, "but the restraint would be an indirect result, however inevitable and whatever its extent; and such result would not necessarily determine the object of the contract, combination, or conspiracy." But this is far from saying that a combination to raise or lower prices aimed directly at the destruction of a particular branch of interstate trade would accomplish that result indirectly, and therefore lawfully. In *United States v. Freight Association*, 166 U. S. 328, 17 Sup. Ct. 554, 41 L. Ed. 1007, the court, referring to the terms of the act, said:

"The plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

The same view was reaffirmed in *United States v. Joint Traffic Association*, 171 U. S. 558, 19 Sup. Ct. 25, 43 L. Ed. 259. In *United States v. Swift & Co.* (C. C.) 122 Fed. 534, Judge Grosscup, referring to the doctrine of the two cases just cited, well said:

"It is clear from them that restraint of trade is not dependent upon any consideration of reasonableness or unreasonableness in the combination averred; nor is it to be tested by the prices that result from the combination. Indeed, combination that leads directly to lower prices to the consumer may, within the doctrine of these cases, even

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as against the consumer, be restraint of trade; and combination that leads directly to higher prices may, as against the producer, be restraint of trade. The statute, thus interpreted, has no concern with prices, but looks solely to competition, and to the giving of competition full play, by making illegal any effort at restriction upon competition."

From the recent case of *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, it would appear that when the questions involved in the opinions of the Supreme Court in the two cases last above quoted shall again come before that court for consideration the majority of the members of the court may hold that the rulings in those cases should have gone no further than to decide that the contracts there presented were unreasonable restraint of interstate trade, and were, as such, within the scope of the act. But if we adopt that view of the law, and assume that the purpose of the act was to place a statutory prohibition only on those combinations which are unreasonable and against public policy, as well as in direct restraint of interstate trade, the present combination, as it is set forth in the complaint, clearly comes within the prohibition. The complaint alleges that the prices placed upon all lumber by the defendants in error are excessive and unreasonable, and that for unfinished lumber their price is double the price of Vancouver lumber of the same kind. The combination, as it is stated in the complaint, is more than a mere agreement to raise prices. It includes also an agreement to coerce purchasers of lumber by other means, and to compel them to desist from the interstate trade. Taking together all the allegations of the complaint, it appears that an active trade in lumber between the Vancouver mills and the Portland consumers of lumber has been restrained by the acts of the defendants in error. By combining as they did they wielded a power that no individual action could possess. They possessed the power to [189] ruin the business of any Portland contractor who imported lumber from the adjoining state, and they exercised that power. Restraint of the trade resulted therefrom, and the restraint was the direct and necessary result of a combination made to carry out that specific purpose. If the allegations of the complaint be true, the defendants in error have violated the prohibition of the act, and are answerable to the plaintiff in error in damages.

Syllabus.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings not inconsistent with these views.

[464] HARRIMAN ET AL. *v.* NORTHERN SECURITIES CO. ET AL.^a

(Circuit Court, D. New Jersey. July 15, 1904.)

[132 Fed., 464.]

INJUNCTION—ALLOWANCE.—Where, in a doubtful case, the denial of a preliminary injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant, through its allowance, the injunction usually should be granted.

SAME.—The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction.

SAME.—Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree as between, the showing of the complainant and of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction.

SAME—PRESERVATION OF FUND.—Where the sole object for which an injunction is sought is the preservation of a fund in controversy, or the maintenance of the status quo, until the question of right between the parties can be decided on final hearing the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant.

SAME.—While the consideration that an appeal does not lie from an interlocutory decree denying a preliminary injunction is entitled to no weight where, on the application, it clearly appears that the complainant cannot prevail on the final hearing, it is often of controlling importance where, on such application, there is room for reasonable doubt as to the ultimate result.

SAME—NOVEL QUESTIONS OF LAW.—In accordance with the foregoing principles, *held*, that a preliminary injunction should issue in a case involving grave, novel and delicate questions of law and a controversy as to material facts bearing upon the equities, regard being had to the comparative hardship or convenience to the respective parties resulting from the awarding or denial of the injunction.

(Syllabus by the Court.)

^a Reversed by the Circuit Court of Appeals, Third Circuit (134 Fed., 331). See p. 618. Decree of C. C. A. affirmed by the Supreme Court (197 U. S., 244). See p. 669.

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In Equity.

R. V. Lindabury, Wm. D. Guthrie, and R. S. Lovett, for complainants.

Elihu Root, John G. Johnson, John W. Griggs, Francis L. Stetson, and W. P. Clough, for defendants.

BRADFORD, District Judge.

Application has been made on bill, affidavits and exhibits, for a preliminary injunction in a suit brought by Edward H. Harriman, Winslow S. Pierce, the Oregon Short Line Railroad Company and The Equitable Trust Company of New York against the Northern Securities Company and the Northern Pacific Railway Company. The present controversy grows out of a situation created by the final decree of the circuit court of the United States for the district of Minnesota in *United States v. Northern Securities Co. et al.* (C. C.) 120 Fed. 721, and the affirmatory decree of the Supreme [465] Court of the United States in the same case. 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. That was a suit in equity brought by the United States against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont. Its object was to enforce the provisions of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Anti-Trust Act. Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. Section 1 declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations," and provides that "every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court." Section 2 provides that "every per-

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son who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor," punishable in like manner and to the like extent as offences under the first section. Section 3 [U. S. Comp. St. 1901, p. 3201] declares illegal "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations," and declares that "every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor," punishable in like manner and to the like extent as offences under the preceding sections. Section 4 provides, among other things, that the several circuit courts of the United States shall have "jurisdiction to prevent and restrain violations of this act," and that proceedings under the act "may be by way of petition." The petition or bill of complaint in the Minnesota suit referred to set forth in substance, among other things, that the Northern Pacific Railway Company and the Great Northern Railway Company were common carriers of freight and passengers and, as such carriers, were engaged in trade and commerce among the several states of the United States and with foreign nations; that on and prior to November 13, 1901, the defendants, Hill, Clough, James and Kennedy, and certain other persons whose names were unknown to the complainant, thereafter referred to as James J. Hill and his associate stockholders, owned or controlled a majority of the capital stock of the Great Northern Railway Company, and the defendants, Morgan, Bacon, Baker and Lamont, and certain other persons whose names were unknown to the complainant, thereafter referred to as J. Pierpont Morgan and his associate stockholders, owned [466] or controlled a majority of the capital stock of the Northern

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Pacific Railway Company; that these two railway companies at and prior to the doing of the acts thereafter complained of, owned or controlled and operated two separate, independent, parallel and competing lines of railway, running east and west, forming the Northern Pacific system and the Great Northern system, connecting the Great Lakes and the Mississippi River with Puget Sound and the Pacific ocean; that Hill and his associate stockholders, and Morgan and his associate stockholders, acting for themselves as such stockholders and on behalf of the two railway companies respectively in which they owned or held a controlling interest, on and prior to November 13, 1901, entered into an unlawful combination and conspiracy "to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce," through the instrumentality of a holding company to be created under the laws of New Jersey and to be called the Northern Securities Company, with a capital stock of \$400,000,000, to which, in exchange for its own capital stock upon a certain basis and at a certain rate was to be transferred the capital stock or a controlling interest in the capital stock of each of the two railway companies, with power in the holding corporation to vote such stock and act as the owner thereof, and do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stock; that thus the individual stockholders of the two competing railway companies were to be eliminated, and the Northern Securities Company, substituted as a single common stockholder, the interest of such individual stockholders in the property and franchises of the railway companies being converted into an interest in the property and franchises of the holding company; that in pursuance of such unlawful combination or conspiracy, and solely as an instrumentality for effecting the purposes thereof, the Northern Securities Company was, November 13, 1901, created under the laws of New Jersey, with an author-

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ized capital stock of \$400,000,000, and on or about the next following day was organized by the election of a board of directors and the selection of a president and other officers; that thereupon Hill and his associate stockholders assigned and transferred to that company a controlling interest in the capital stock of the Great Northern Railway Company, upon an agreed basis of exchange of \$180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and Morgan and his associate stockholders assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of \$115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company offered to the stockholders of the two railway companies to issue and exchange its capital stock for the capital stock of those companies [467] upon the above mentioned basis of exchange, no other consideration being required; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company had acquired an additional amount of the stock of the two railway companies, issuing therefor its own stock upon the same basis of exchange, and was then holding as owner substantially all of the capital stock of the Northern Pacific Railway Company and a majority of or controlling interest in the capital stock of the Great Northern Railway Company, and was voting the same, collecting the dividends thereon, and in all respects acting as owner thereof in the organization, management and operation of such railway companies, and in receipt and control of their earnings; that thus a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific railway systems had been effected, a combination or conspiracy in restraint of the trade or commerce among the several states and with foreign nations, formerly carried on by the two railway companies independently and in free competition one with the other, had been formed and was in operation,

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and the defendants were thereby attempting to monopolize, and had monopolized, such interstate and foreign trade and commerce, in violation of the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], above referred to; that no consideration whatever had existed, or would exist, for the above mentioned transfer of the stock of the railway companies by their stockholders to the Northern Securities Company other than the issue of the stock of the latter company to them in exchange therefor, for the purpose, in the manner, and upon the basis above stated; that the Northern Securities Company was not organized in good faith to purchase and pay for the stock of the two railway companies, but solely to incorporate the pooling of the stock of said companies and to carry into effect such unlawful combination or conspiracy; that the Northern Securities Company was a mere depository, custodian, holder and trustee of the stock of the railway companies, and its shares of stock were but beneficial certificates issued against such railway stock to designate the interest of the holders in the pool; and that its subscribed capital was but \$30,000, and its authorized capital stock of \$400,000,000 was just sufficient, when all issued, to cover the exchange value of substantially the entire stock of the two railway companies, upon the basis and at the rate agreed upon, such exchange value being about \$122,000,000 in excess of the combined capital stock of such railway companies taken at par. Answers and replications were duly filed, evidence was taken and such proceedings were thereafter had in the case that a decree was entered in the circuit court April 9, 1903, pursuant to the prayers of the petition or bill, but not including all the relief therein asked. In that decree it was declared that the defendants, in violation of the Anti-Trust Act, had entered into a combination or conspiracy in restraint of trade and commerce among the several states, and that all of the stock of the Northern Pacific Railway Company and of the Great Northern Railway Company "now claimed to be owned and held by the defendant, The Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States," [468] and

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a perpetual injunction was granted restraining the Northern Securities Company from "acquiring or attempting to acquire further stock of either of the aforesaid railway companies," or "voting the aforesaid stock which it now holds or may acquire," or "attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies," or "exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein;" and restraining the Northern Pacific Railway Company and the Great Northern Railway Company respectively and collectively from "permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies," or "paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold," or "permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies." Immediately after the injunctive portion of the decree is the following clause:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, the Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

It may not be without significance, although it is unnecessary now to discuss the point, that the relief prayed in the petition or bill of the United States was in some particulars broader than that granted in the final decree. This decree was in all respects affirmed by the Supreme Court of the

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United States March 14, 1904, "with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require." Mr. Justice Harlan in his opinion affirmatory of the decree of the court below, among other things, said:

"No valid objection can be made to the decree below, in form or in substance. * * * The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose."

No opinion is now expressed or intimated as to the force or effect of the above utterance.

[469] Thereafter the board of directors of the Northern Securities Company adopted March 22, 1904, certain preambles and resolutions, reciting that the company "has acquired and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company," and "has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company," and that "there are now outstanding 3,954,000 shares of its own capital stock," and that it "desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay," and declaring it "necessary and desirable for this company so to reduce its present capital stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it," and advisable that the fourth article of its certificate of incorporation should be so amended as to read as follows:

"Fourth. The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars (\$3,954,000), and shall hereafter be three million nine hundred and fifty-four [thousand] dol-

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lars (\$3,954,000), divided into thirty-nine thousand five hundred and forty (39,540) shares of one hundred dollars (\$100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine per centum of the shares held by him. Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents (\$39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents (\$30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company."

The resolutions also called for a meeting of the stockholders of the Northern Securities Company, to be held April 21, 1904, for the purpose of taking action upon the proposed alteration of its certificate of incorporation.

The bill in the present suit sets forth in substance, among other things, that the total authorized capital stock of the Northern Pacific Railway Company in November, 1901, amounted to \$155,000,000 par value, consisting of \$75,000,000 par value of preferred stock and \$80,000,000 par value of common stock; that such proceedings were had in November and December, 1901, that such preferred stock was converted into common stock, so as to make the entire issue of stock of the Northern Pacific Railway Company consist of common stock to the amount of \$155,000,000 par value, and such is the authorized amount of its capital stock issued and now outstanding; that the authorized capital stock of the Great Northern Railway Company in November, 1901, was and still is about \$125,000,000 par value, of which about \$123,000,000 par value has been issued and was then and is now outstanding; that the Northern Pacific and Great Northern railway systems are substantially parallel and in a position to compete with each other in the transaction of interstate and foreign commerce carried on by them; that the North- [470] ern Securities Company, although incorporated and organized in form according to and nominally for objects authorized by the laws of New Jersey, in reality was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several states and for objects prohibited by the Anti-Trust Act; that prior to November 13, 1901, Hill,

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Morgan, Clough, James, Kennedy, Bacon, Baker, and Lamont, and their associates, owning or controlling a majority of the capital stock of the Great Northern Railway Company and a majority of the common capital stock of the Northern Pacific Railway Company, agreed to organize a holding company under the laws of New Jersey, and that such holding company should acquire and permanently hold a majority of the shares of the capital stock of those railway companies respectively and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with such holding company and receive in lieu thereof share certificates of the holding company upon the basis of \$180 par value of its stock for each share of the Great Northern Railway stock, and \$115 par value of its stock for each share of the Northern Pacific Railway stock, and that the holding company should act as custodian, depository or trustee of such railway shares on behalf of the existing shareholders of the two railway companies and their associates; that thereupon in pursuance of such agreement the Northern Securities Company was created and organized under the laws of New Jersey, for the object of acquiring and holding shares of the capital stock of other corporations, and with an authorized capital stock of \$400,000,000, divided into four million shares of the par value of \$100 each, and forthwith agreed to acquire and hold the shares of stock of the two railway companies as custodian, depository or trustee, and to issue in exchange therefor its own share certificates upon the above mentioned basis; that prior to April 9, 1903, about \$176,822,900 par value of the stock of the Northern Securities Company was issued in exchange for about \$153,759,400 par value of the stock of the Northern Pacific Railway Company, and about \$211,037,600 par value of the stock of the former company was issued in exchange for about \$118,124,200 par value of the stock of the Great Northern Railway Company, and about \$7,522,000 par value of the stock of the Northern Securities Company was issued for cash used for the purchase of other property and for corporate purposes; that the Northern Securities Company caused the certificates for such railway shares to be transferred to

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and registered in its own name or the names of its agents and ever since has held and now holds the same so registered; that such issue of capital stock of the Northern Securities Company for the stock of the two railway companies was to the then existing holders of stock in such railway companies in exchange for certificates for such railway stock and for the purpose of effectuating the above mentioned scheme or combination whereby the Northern Securities Company, holding a majority of the shares of stock of the two railway companies, would be enabled to control the operation and management of the same; that all the persons to whom stock of the Northern Securities Company was issued for shares of either of the railway companies or for cash had full knowledge of the purposes for which it was organized, and of the fact that a [471] majority of the capital stock of each of the railway companies had been or was to be deposited with it as custodian or depository in pursuance of the above mentioned agreement; that prior to the time of the incorporation and organization of the Northern Securities Company, the Oregon Short Line Railroad Company had acquired and at that time owned \$37,023,000 par value of the common stock, and \$41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, represented by certificates issued to and registered in the names of the complainants Harriman and Pierce; that after the incorporation of the Northern Securities Company had been resolved upon Harriman, Pierce and the Oregon Short Line Railroad Company agreed with the promoters and incorporators of the former company to transfer to and deposit with it under the terms and conditions before stated, the shares of the Northern Pacific Railway Company of the aggregate par value of \$78,108,000 owned by the Oregon Short Line Railroad Company, and to receive in exchange therefor certificates of the Northern Securities Company representing an interest therein of \$82,491,871 par value, and \$8,915,629 in cash, and in pursuance of such agreement Harriman and Pierce, acting for the Oregon Short Line Railroad Company, did, on or about November 18, 1901, transfer and deliver to the Northern Securities Company certificates for \$37,023,000 par value of

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the common stock and \$41,085,000 par value of the preferred stock of the Northern Pacific Railway company, owned by the Oregon Short Line Railroad Company, and received in exchange therefor certificates of the Northern Securities Company representing an interest of \$82,491,871 par value, and the above mentioned sum of \$8,915,629 in cash; that Harriman and Pierce are now, and ever since November 18, 1901, have been, the registered owners and holders of the \$82,491,871 par value of the shares of the Northern Securities Company, and such holding of stock is and at all times has been by them as trustees for the use and benefit of the Oregon Short Line Railroad Company, which is the beneficial owner thereof; that the \$82,491,871 par value of the stock of the Northern Securities Company so standing in the names of Harriman and Pierce, was part of the original issue of stock by that company; that the above mentioned exchange was made by Harriman and Pierce and the Oregon Short Line Railroad Company in good faith and in the belief that the organization of the Northern Securities Company was not, and the acquisition and holding by it of the stock of the two railways as stated would not be, in violation of any statute of the United States, and it was owing to such belief that the complainants did not, pending the final determination of the suit brought by the United States in Minnesota, take any steps or institute any proceedings for the protection of their rights in the premises; that the Oregon Short Line Railroad Company by indenture dated July 17, 1902, duly pledged \$82,491,000 par value of the stock of the Northern Securities Company with The Equitable Trust Company of New York, as trustee, for an issue of bonds of that railroad company, of which bonds \$82,491,000 face value have been certified and issued and are now outstanding; that the stock of the Northern Securities Company, so issued to Harriman and Pierce November 18, 1901, is still registered in their names and the certificates therefor duly endorsed are now in the actual cus- [472] tody of The Equitable Trust Company of New York as pledgee, and are available for tender, return or restoration to the Northern Securities Company; that at the time of such exchange, on or about November 18, 1901, it was agreed between Harri-

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man and Pierce and the Northern Securities Company that the \$41,085,000 par value of the preferred stock of the Northern Pacific Railway Company should be converted into common stock of that railway company, and such preferred stock was subsequently, in or about December, 1901, converted by the Northern Securities Company into such common stock of the same par value; that certificates for \$34,709,062 par value of such common stock registered in the name of the Northern Securities Company on the books of the railway company were substituted in lieu of the certificates for such preferred stock; that the Northern Securities Company caused such original common stock to be transferred to it upon the books of the railway company, and now holds within the jurisdiction of this court certificates registered in its name on the books of the railway company, namely, the Northern Pacific Railway Company, for such common stock so originally received from Harriman and Pierce, and for the common stock into which such preferred stock was so converted and certificates substituted as above mentioned. The bill then sets forth in substance the proceedings in *United States v. Northern Securities Company et al.* (C. C.) 120 Fed. 721, and the final decree therein of the circuit court and the decree of the Supreme Court of the United States on appeal. The bill further alleges in substance that the complainants were represented in that suit by the Northern Securities Company and the Northern Pacific Railway Company as well as by the individual defendants, Morgan, Bacon, Baker and Lamont, who were named as the representatives of original holders and owners of the stock of the Northern Pacific Railway Company acquired and held by the Northern Securities Company; that the effect of the decree of the circuit court as affirmed by the Supreme Court of the United States was to adjudge that the Northern Securities Company was not a purchaser or owner, but simply a custodian, of the shares of stock of the two railway companies acquired and held by it; that it acquired and held possession thereof in violation of the Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]; that it acquired no title thereto and cannot transfer any rights in respect

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thereof; that the legal and equitable owners thereof were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns; that immediately upon the rendition of the decision of the Supreme Court of the United States the Northern Securities Company, through its board of directors, determined fully and unreservedly to abandon and terminate the above mentioned combination and its holding of such railway stock, and to that end to reduce the capital stock of the company by ninety-nine per cent thereof, or to \$3,954,000 par value, and to distribute and divide the stock of the two railway companies held by it, pro rata among its own stockholders, but not to return and retransfer to the stockholders of those railway companies, respectively, or their assigns, any of the shares of stock in either of them which it, the Northern Securities Company, originally received from such stockholders in exchange for its own stock; that in order to consummate such purposes [473] the board of directors of the Northern Securities Company on or about March 22, 1904, adopted the preambles and resolutions hereinbefore referred to; that thereupon a circular or notice was issued by and on behalf of that company to its stockholders, notifying them of a special meeting for the purpose of voting upon the proposition submitted by the directors in the resolutions adopted; that such meeting of stockholders was held April 21, 1904, and at it the stock of the Northern Securities Company was reduced ninety-nine per cent by a vote of more than seventy-five per cent. in interest of its stockholders, and by a like vote the proposed plan of pro rata distribution was assented to, but the complainants then and there duly protested that such plan of distribution was illegal and in violation of their rights; that such plan is unauthorized by law, illegal and ultra vires the Northern Securities Company, in violation of the rights and equities of the complainants, and of the laws of the United States and of New Jersey; that such plan has never been assented to by the complainants and is not binding upon them; that the books and records of the Northern Securities Company show for what purpose or consideration each outstanding certificate of stock was originally is-

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sued, whether for cash or for stock of the Northern Pacific Railway Company or of the Great Northern Railway Company, and will disclose that a large part of the stock of the Northern Securities Company, issued originally in exchange for stock of those railway companies, is now held in the name or on behalf of original holders who exchanged the same for stock of the railway companies, and, wherever there have been transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the Northern Securities Company so transferred to third parties can be so traced and shown in and by such books and records that the assignees of the original holders can be identified and the stock of either railway company originally exchanged by the assignors can be delivered to such assignees in exchange for their present holdings of stock of the Northern Securities Company; that the Northern Securities Company threatens and intends immediately to distribute the shares of stock of each of the two railway companies pro rata among its, the Northern Securities Company's, stockholders in disregard of the rights of the complainants, and unless enjoined by this court from so doing, will forthwith make such distribution, whereby stock of the Northern Pacific Railway Company belonging to the complainants, and to which they are entitled will be lost by them, and they will thereby suffer injury which cannot be compensated in damages, in that the shares of stock of that railway company to which they are so entitled are registered on the books of the railway company in the name of the Northern Securities Company, and those railway company shares or any like amount of such shares cannot be purchased in any market or from any persons; that the proposed distribution pro rata in lieu of the return and restitution of the stock of the railway companies would involve a loss of annual income to the complainants amounting to over \$1,000,000, the dividends at the rate now paid upon the stock of the Northern Pacific Railway Company to which they are en- [474] titled exceeding by more than \$1,000,000 per annum the dividends upon the stock of the Great Northern Railway Company and Northern Pacific Railway Company which they would receive upon such

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pro rata distribution; that the value of the stock of the Northern Pacific Railway Company to which the complainants are entitled now exceeds and at all times mentioned in the bill exceeded by more than \$10,000,000 the aggregate value of the pro rata share of the stock of the two railway companies which they would receive upon such pro rata distribution, which would be \$32,070,612 par value of stock of the Northern Pacific Railway Company and \$24,638,919 par value of stock of the Great Northern Railway Company, instead of \$78,108,000 par value of stock of the former company; that the complainants are ready, able and willing, and offer, to return and deliver, or cause to be returned and delivered, and they tender, to the Northern Securities Company all the certificates for the shares of its capital stock so received by them, and such part of the above mentioned sum of \$8,915,629 in cash, paid to them by or on behalf of that company, as may be just, or such further or other sum as the court shall fix, in exchange for and upon the return of the common stock of the Northern Pacific Railway Company, delivered and exchanged by them as above stated, and the common stock of such railway company into which the preferred stock so exchanged was converted, and they offer to bring into court such stock of the Northern Securities Company and such moneys whenever the court shall direct, and in all respects to do equity and right in the premises; and that, after the return and restoration of the original depositors or their assigns of all the shares of stock of the railway companies, acquired and held by the Northern Securities Company, as above stated, there will remain in the treasury of that company assets and funds sufficient to pay and redeem all of the \$7,522,000 par value of its stock issued for cash, or to fully compensate any holders thereof if compensation be adjudged. The complainants pray that it may be decreed that the proposed plan of distribution is illegal and in violation of their rights and equities, and that they are entitled to the return and transfer to them by the Northern Securities Company of the shares of common stock of the Northern Pacific Railway Company, which were so delivered by Harriman and Pierce, and the shares of

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common stock into which the preferred stock of that railway company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by the complainants, and such sum in cash as may be just; that the Northern Securities Company may be ordered and directed to endorse the certificates now held by it for such stock of the Northern Pacific Railway Company to the Oregon Short Line Railroad Company, or in blank, and deliver the same to The Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by such trust company, to be subject to its rights and lien as trustee; that the Northern Securities Company be perpetually enjoined and restrained from parting with, disposing of, transferring, assigning or distributing any part of the stock of [475] the Northern Pacific Railway Company received from Harriman and Pierce, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to the complainants in exchange for its own stock issued as above stated and the cash now tendered by them; that the complainants have such other or further relief as shall be proper under the circumstances; and that the Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing the stock of the Northern Pacific Railway Company in question, or any part thereof, or any certificates now representing the same during the pendency of this suit.

The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. On the presentation of their arguments for and against the awarding of a preliminary injunction counsel on both sides have with strong insistence urged, and with elaboration and signal ability dis-

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cussed, a number of legal propositions, important and far-reaching in their scope, and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have during a hearing of nearly three days pressed them with zeal and in manifest reliance upon their soundness and materiality. The briefs of argument and authorities, containing nearly 800 printed pages, and principally devoted to the discussion of the principles of law and equity deemed applicable to the case, fairly may be accepted as evidence that much may seriously be said on each side about the law, if not the facts, involved. The case not being ripe for a final decision, the present application is for a preliminary injunction. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, [476] the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship

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ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree as between, the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the status quo, until the question of right between parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting. In *Russell v. Farley*, 105 U. S. 433, 438, 26 L. Ed. 1060, the court through Mr. Justice Bradley said:

"It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party."

In *City of Newton v. Levis*, 79 Fed. 715, 25 C. C. A. 161, the circuit court of appeals for the eighth circuit through Judge Sanborn said:

"The granting or withholding of a preliminary injunction rests in the sound judicial discretion of the court, and the only question presented by this appeal is whether or not the court below erred in the exercise of that discretion, under the established legal principles which should have guided it. The propriety of its action must be considered from the standpoint of that court. * * * The controlling reason for the existence of the right to issue a preliminary

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injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond if the injunction is granted. A preliminary injunction maintaining the status quo may properly issue when- [477] ever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted. * * * The arguments and brief of counsel invite us to a consideration of the questions of law which must be finally determined upon a demurrer to the bill, or upon a final hearing of this case after answer. We have, however, found it unnecessary to decide these questions on this appeal, and we express no opinion upon them. They are of sufficient importance and difficulty to demand careful examination and deliberate consideration," etc.

In *Glascott v. Lang*, 3 Myl. & C. 451, 455, Lord Chancellor Cottenham said:

"In looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

In *Hadden v. Dooley*, 74 Fed. 429, 431, 20 C. C. A. 494, the circuit court of appeals for the second circuit through Judge Shipman said:

"When the questions which naturally arise upon the transactions make them a proper subject for deliberate examination, if a stay of proceedings will not result in too great injury to the defendants, it is proper 'to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined' by evidence and proofs which have the merit of accuracy."

In *Great Western R. Co. v. Birmingham, etc., R. Co.*, 2 Phil. Ch. 597, Lord Chancellor Cottenham said:

"It is certain that the court will in many cases interfere and preserve property in statu quo during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser pendente lite would gain a title; but it would embarrass the original purchaser in his suit against the vendor which the court prevents by its injunction. * * * It is true that the court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to de-

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cide upon the merits in favor of the plaintiff. If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favor of the defendants, and so inadequate to support the relief prayed by the bill, as to justify the court in permitting it to be disposed of, and new titles or interests to be introduced, before any decision can be obtained upon the case so made?"

In *Shrewsbury & Chester R. Co. v. Shrewsbury R. Co.*, 1 Sim. N. S. *410, *426, *427, *432, the Vice-Chancellor, Lord Cranworth, said:

"When the court is called on to interfere to preserve property *pendente lite*, there are, I apprehend, two points on which the court must satisfy itself. First, it must satisfy itself, not that the plaintiff has, certainly, a right, but that he has a fair question to raise as to the existence of such a right. * * * Where it is made out that there is a point to be decided which the plaintiff is fairly raising, still, there is a further question, namely, whether interim interference, on a balance of convenience and inconvenience to the one party and to the other, is or is not expedient. Where the alternative is interference or [478] probable destruction of the property, there, of course, the court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant. But where, on the other hand, the only evil to result from non-interference is, that the plaintiff may, by the contracts or deeds of the defendant, be retarded or embarrassed in his litigation, there the court will be far more ready to listen to any suggestion of the defendant showing that interference during litigation will prejudice his rights. * * * Although I am perfectly satisfied of the authority of this court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff in his suit, and that the court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the court must be guided by a discretion not to exercise it where it sees that on the balance of convenience and inconvenience between interim interference and non-interim interference the balance greatly preponderates in favor of the defendant and against the plaintiff."

In the above case a preliminary injunction was refused on the ground of the "enormous preponderance of inconvenience in granting the injunction over any possible inconvenience in refusing it." The doctrine of the foregoing cases is contained in many others from which there is no occasion to quote. *Denver & R. G. R. Co. v. United States*, 124 Fed. 156, 59 C. C. A. 579; *Allison v. Corson*, 88 Fed. 581, 32 C. C. A. 12; *Buskirk v. King*, 72 Fed. 22, 18 C. C. A. 418; *Sanitary Reduction Works v. California Reduction Co.* (C. C.) 94 Fed. 693; *Southern Pac. Co. v. Earl*, 82 Fed. 690, 27 C. C. A. 185; *New Memphis Gas & Light Co. v. Memphis* (C. C.) 72 Fed. 952; *Indianapolis Gas Co. v. Indian-*

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apolis (C. C.) 82 Fed. 245; *Georgia v. Brailsford*, 2 Dall. 402, 1 L. Ed. 433.

It does not appear, nor has it been claimed or intimated, that the granting of the preliminary injunction asked for would interfere with the operation of the Northern Pacific Railway Company and the Great Northern Railway Company, or either of them, or otherwise prove detrimental to the interests of the public. It undoubtedly would, during the continuance in force of the injunction, preclude the stockholders of the Northern Securities Company, or a considerable proportion of them, from directly or indirectly receiving dividends on the stock of either of the railway companies, unless under and by virtue of some voluntary extrajudicial arrangement. But this court has power to require of the complainants as a condition precedent to the issuing of the injunction, a bond in such form and amount as fully to indemnify all persons, who may ultimately be found entitled to such dividends against all loss or damage resulting from the suspension of their payment. On the other hand, the denial of a preliminary injunction would, if the complainants should ultimately prevail, render barren their victory so far as relief in this suit is concerned. The stock of the two railway companies would be distributed pro rata among the stockholders of the Northern Securities Company in accordance with the plan of distribution adopted by the latter company. The complainants would receive, instead of stock of the Northern Pacific Railway Company of the par value of \$71,732,062 claimed by them, stock of that company amounting at par to only \$32,070,612, and stock of the Great Northern Railway Company of the par value of [479] \$24,638,919. The difference in the par value between the stock of the Northern Pacific Railway Company claimed by the complainants and the stock of that company which they would receive under the proposed plan is \$39,661,450. If the complainants be sustained in their contention here made as to their ownership and right to recover stock, such right would not extend to stock of the Great Northern Railway Company, but only to stock of the Northern Pacific Railway Company. A pro rata distribution under the proposed plan of the \$39,661,450 par value of stock of the latter

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company, included in the amount now sued for, among the stockholders of the Northern Securities Company, other than the complainants, would not only debar the latter from any relief to which they may be entitled under their present bill, but to a moral certainty entail upon them a burdensome multiplicity of suits attended with great labor and expense. It would also obviously be calculated to hinder, embarrass and probably or possibly defeat them in their effort to recover large quantities of such stock from persons purchasing the same in good faith and for full consideration, directly or indirectly, from the stockholders of the Northern Securities Company participating in such pro rata distribution, through the creation of new equities on the part of such purchasers. In view of the character of the questions involved in this case it would be highly inequitable that the complainants should, in advance of any final decision on the merits, be put in such a position as to be precluded, either wholly or in large measure, from the realization and enjoyment of the fruits which should be theirs through the immediate result of a final decree in the present case, should it ultimately be determined in their favor.

It appears from the bill, affidavits and exhibits, that, aside from any question of right between the parties to one kind of stock in contradistinction to another, the real value in dispute is of great magnitude. For \$37,023,000 par value of common stock and \$41,085,000 par value of preferred stock of the Northern Pacific Railway Company turned over by Harriman and Pierce to the Northern Securities Company November 18, 1901, the latter company issued to them \$82,491,871 par value of its stock and also paid them \$8,915,629 in cash. All of the common and preferred stock so turned over by Harriman and Pierce, aggregating \$78,108,000 par value was taken by the Northern Securities Company at an agreed real valuation of \$115 for each \$100 at par without distinction between common and preferred stock. The plan of pro rata distribution of the Northern Securities Company contemplates the transfer and assignment to all stockholders of that company of both preferred stock of the Great Northern Railway Company and common stock of the Northern

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Pacific Railway Company, in such manner that each and every holder of stock of the Northern Securities Company will, on the basis of the surrender to it for cancellation of 99 per cent. of such stock, receive for each \$100 par value of such surrendered stock \$30.17 par value of the preferred stock of the Great Northern Railway Company and \$39.27 par value of the common stock of the Northern Pacific Railway Company. Under the proposed plan [480] the holders of the remaining one hundredth of the stock of the Northern Securities Company would also be entitled to share in the residue of property in the treasury of that company remaining after the reduction of its stock by 99 per cent. The complainants hold \$82,491,871 par value of the stock of the Northern Securities Company, and, as before stated, would receive \$24,638,919 par value of the preferred stock of the Great Northern Railway Company and \$32,070,612 par value of the common stock of the Northern Pacific Railway Company. The present real or market value of the preferred stock of the former company is about, and is admitted to be, \$170 for each \$100 par value, while that of the common stock of the Northern Pacific Railway Company is \$135 for each \$100 par value. Under the proposed plan the real value which the complainants would receive in stock of the Great Northern Railway Company would be \$41,886,162, and the real value which they would receive in stock of the Northern Pacific Railway Company would be \$41,295,326, making a total of \$83,181,488, aside from any interest they might have in any undisposed of residue of property remaining in the treasury of the Northern Securities Company. Reference will later be made to such undisposed of residue. It appears from the affidavits and exhibits that in November, 1901, the Northern Pacific Railway Company adopted a plan for the conversion of all its preferred stock into common stock; the preferred stock then amounting to \$75,000,000 par value, and the common stock to \$80,000,000 par value. Under this plan the Northern Securities Company, as the holder of \$37,023,000 par value of the common stock became entitled to surrender preferred stock of the Northern Pacific Railway Company and receive therefor seventy five eightieths of its par value in the new common stock. There is evidence furnished by

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the affidavits and exhibits that the Northern Securities Company exercised this right and received of such new common stock \$34,709,062 at par. If such be the fact, the latter company thereupon became the holder of \$71,732,062 par value of common stock, the real value of which at \$135 for \$100 par value is \$96,838,283. The deduction from the \$41,085,000 par value of the preferred stock of the Northern Pacific Railway Company of the \$37,023,000 par value of such stock, the surrender of which to that company for cancellation was necessary for the acquisition of the \$34,709,062 of its new common stock, left a balance of \$4,062,000 par value of its preferred stock. If this balance was sold or disposed of at par,—and it may reasonably be inferred from the affidavits and exhibits that it was not sold or disposed of for less,—its proceeds, \$4,062,000 fairly may be treated as an offset to the cash payment of \$8,915,629, originally made by the Northern Securities Company to Harriman and Pierce. On this theory the balance of the \$8,915,629 over the \$4,062,000, amounting to \$4,853,629, when deducted from \$96,838,283, the present real value of the \$71,732,062 par value of the common stock of the Northern Pacific Railway Company, leaves a balance of \$91,984,654. From this balance would be deducted \$83,181,488 which the complainants would receive under the pro rata plan, leaving \$8,803,166 in their favor, less the amount of their share of [481] the above mentioned residue in the treasury of the Northern Securities Company and a just allowance of interest on the cash balance. The above mentioned sum of \$8,915,629, paid by the Northern Securities Company to Harriman and Pierce November 18, 1901, had been loaned to that company by the firm of J. P. Morgan & Company. On or about January 1, 1902, \$6,375,938 par value of the \$41,085,000 par value of preferred stock of the Northern Pacific Railway Company originally transferred by Harriman and Pierce to the Northern Securities Company, having previously been surrendered to the Northern Pacific Railway Company and retired, its proceeds, amounting to its par value, were paid by the Northern Securities Company to J. P. Morgan & Company in partial liquidation of the cash loan of \$8,915,629 made by that firm to the

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latter company. The affidavits and exhibits furnish evidence of some weight that the above mentioned par value of \$6,375,938 of preferred stock of the Northern Pacific Railway Company was deducted by the Northern Securities Company from the \$41,085,000 par value of preferred stock of that railway company, thereby reducing the latter amount to \$34,709,062 at par, and that the remaining preferred stock, namely, \$34,709,062 par value was, through the instrumentality of convertible certificates issued by the Northern Pacific Railway Company converted into new common stock of equal par value. If such be the case, the claim of the complainants would extend to the \$37,023,000 par value of the old common stock, and the \$34,709,062 par value of the new common stock, aggregating \$71,732,062 par value of common stock, having a real value of \$96,838,283. The deduction from this amount of \$2,539,691, representing the difference between the original cash payment of \$8,915,629 and \$6,375,938, proceeds of preferred stock retired, should be deducted from the total amount leaving a balance amounting in real value to \$94,298,592. Deducting from this amount \$83,181,488, which the complainants would receive under the proposed distribution, leaves \$11,117,104 in their favor, less the amount of their share of the residue in the treasury of the Northern Securities Company after the proposed distribution. There should also be a further deduction of such sum by way of interest on cash received as above stated by Harriman and Pierce from the Northern Securities Company as may be just. This item, however, would be of comparative insignificance in its relation to the other values involved in the suit. In a journal of the Northern Securities Company is the following entry:

" 1901.
Novbr. 18th.

Investment Account No. 1.

| | | |
|---|-----------------------|--------------|
| | To Capital Stock a/c. | |
| For 410,850 shs. N. P. Pfd. stock bought from E. H. Harri- | | |
| man and Winslow S. Pierce for----- | | \$41,085,000 |
| Less paid in cash as per entry in cash book this day----- | | 8,915,629 |
| | | <hr/> |
| Balance paid in stock----- | | \$32,169,371 |
| say 321,693 shs. & \$71 scrip issued as fully paid up stock | | |
| @ par." | | |

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[482] Whatever may be the merit of this entry as viewed from the standpoint of scientific bookkeeping, the words and figures "Balance paid in stock \$32,169,371," are, when considered in connection with other exhibits and the affidavits, confusing and misleading in their bearing upon the conversion, whether directly or indirectly, of preferred stock of the Northern Pacific Railway Company originally turned over by Harriman and Pierce to the Northern Securities Company into new common stock of the former company. Any assumption that the above mentioned balance of \$32,169,371 par value of preferred stock of the Northern Pacific Railway Company was not converted, either at par or on the seventy five eightieths basis, into new common stock of that company, by the Northern Securities Company, appears irreconcilable with controlling evidence touching the conversion of preferred into common stock, furnished by the affidavits and exhibits considered as a whole. A fact, which on the present showing seems indisputable, is that the Northern Securities Company, in addition to the \$37,023,000 par value of the common stock of the Northern Pacific Railway Company originally turned over to the former company by Harriman and Pierce, acquired through the instrumentality of convertible certificates issued by the railway company new common stock of the par value of \$34,709,062. It is unimportant, so far as the point under immediate discussion is concerned, whether that amount of new common stock was secured, on the one hand by a surrender to the railway company of \$37,023,000 par value of its preferred stock on the seventy five eightieths basis, or, on the other, by a surrender to the railway company of its preferred stock of the par value of \$34,709,062 for its new common stock of the same par value. It is not claimed or suggested that the balance of \$32,169,371 par value of preferred stock, mentioned in the journal entry, was sold by the Northern Securities Company absolutely for cash and without intention on its part, directly or indirectly, to convert such balance of preferred stock into the new common stock of the Northern Pacific Railway Company. Any such contention would, on the present showing, be wholly inadmissible. The affidavits and exhibits fail to disclose, and coun-

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sel have not attempted to explain, how that balance of preferred stock was, or, on any basis or theory justified by the evidence, could have been, converted into \$34,709,062 par value of the new common stock of the Northern Pacific Railway Company. Yet, if, notwithstanding the foregoing considerations, it be assumed that only \$32,169,371 par value of the original \$41,085,000 par value of preferred stock of that railway company, transferred by Harriman and Pierce to the Northern Securities Company was converted into the new common stock of the railway company of an equal par value, the old and new common stock would aggregate \$69,172,371 par value or a real present value of \$93,409,701. The deduction from the latter amount of the \$83,181,488 which the complainants would receive under the proposed pro rata distribution would leave a balance of \$10,228,213 of real value in their favor, less the amount of their participation in the residue of the property remaining in the treasury of the Northern [483] Securities Company. Or, further, if it be assumed that the \$32,169,371 par value of preferred stock of the Northern Pacific Railway Company was converted into new common stock of that company on the basis of seventy five eightieths, it would represent \$30,158,785 par value of new common stock, the real value of which is \$40,714,360. This latter sum added to \$49,981,050, representing the real value of \$37,023,000 par value of the old common stock would aggregate \$90,695,410, and the deduction from this sum of the \$83,181,488 which the complainants would receive under the proposed distribution, would leave a balance of \$7,513,922 of real value in their favor, less their share of the residue of the property in the treasury of the Northern Securities Company.

The stock of the Northern Securities Company outstanding April 21, 1904, and presumably now outstanding, is of the par value of \$395,400,000, divided into 3,954,000 shares of the par value of \$100 each. That company now holds 1,537,594 shares of the stock of the Northern Pacific Railway Company and 1,181,242 shares of stock of the Great Northern Railway Company, of the par value of \$100 each. The proposed pro rata plan of distribution contemplates the reduction of the total outstanding stock of the Northern Se-

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curities Company by 99 per cent. To accomplish this result the Northern Securities Company offers, on the surrender to it of that proportion of its stock, amounting at par to \$391,446,000, to deliver or pay for each \$100 par value thereof surrendered \$39.27 par value of stock of the Northern Pacific Railway Company, and \$30.17 par value of stock of the Great Northern Railway Company, and "proportional amounts thereof for fractional shares of the stock of this company." \$39.27 on each \$100 of \$391,446,000 so closely approximates to the par value of the 1,537,594 shares of stock of the Northern Pacific Railway Company that for any practical purpose on the present application it may be considered equal to it. And \$30.17 on each \$100 of \$391,446,000 so closely approximates to the par value of the 1,181,242 shares of stock of the Great Northern Railway Company that for any such purpose it may be considered equal to it. Thus, the surrender of ninety nine one hundredths of the outstanding stock of the Northern Securities Company would necessarily involve the transfer and alienation by it of practically all the stock of the Northern Pacific Railway Company and Great Northern Railway Company now held by it. Whatever of real value the remaining one hundredth of the par value of the outstanding stock of the Northern Securities Company, \$3,954,000, might represent, would consist wholly, or practically wholly, of property other than stock of both or either of the two railway companies. It does not appear from the affidavits and exhibits what amount of property would remain in the treasury of the Northern Securities Company after the distribution of the railway stock referred to. Nor does it appear whether the company is or is not indebted, nor whether there are or are not other charges or expenses paramount to the claims of the holders of the remaining one hundredth of its stock. As between the complainants applying for a preliminary injunction, and the Northern Securities Company resisting the application [484] partly on the ground that the real value in dispute is not sufficient to warrant an exercise of the injunctive power, the burden of showing the amount of property in which the complainants would share under the proposed plan, clearly, in view of the fact that the company is chargeable with full

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knowledge of the character, amount and condition of its own property and finances, rested upon it. It must be presumed to have been able to make such a showing. Its failure so to do gives rise to an unfavorable inference. But even if it be assumed that the real value of the residue of the property would be \$3,954,000, the par value of the remaining stock, the complainants would under the proposed plan, in the absence of any reduction or obliteration of the fund through possible indebtedness or other charges or expenses, receive as their share approximately \$824,919. This sum, though a large amount, is but a small proportion of the real value which the complainants would receive, if entitled to recover. It is less than one twelfth of \$11,117,104; less than one eleventh of \$10,228,213; less than one ninth of \$8,803,166; and less than one eighth of \$7,513,922. It is unnecessary, and would be tedious, to discuss in this connection and on the present application the subject of interest, as at most it is a matter of comparative insignificance. In leaving the discussion of real values involved in this suit it should be borne in mind that the right of the complainants to recover, if it exists, extends to stock of the Northern Pacific Railway Company, amounting on the present showing to from \$69,000,000 to \$71,000,000 approximately at its par value, and to a much larger sum at its real value, and that they disclaim all right to the stock of the Great Northern Railway Company which the Northern Securities Company insists should be taken by them, instead of the larger amount of the stock of the Northern Pacific Railway Company claimed by them. From this point of view there possibly may be some doubt of the pertinency of the foregoing discussion of balances of real values to the consideration of the propriety of granting or withholding the injunction. On this point no opinion is expressed. It was urged by the defense at the hearing that the granting of the relief sought by the complainants would be injurious to many stockholders of the Northern Securities Company, other than the complainants, who acquired their stock in good faith and for full consideration, for the reason that in many instances and to a large amount stock of that company had been so issued or transferred as to render it impossible to trace or identify the con-

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sideration of such issue or transfer. It appears that prior to April 9, 1903, stock of the Northern Securities Company of the par value of \$7,522,000 was issued for cash used in the purchase of stock of the Great Northern Railway Company and other stocks held by the Northern Securities Company, and also that its stock to a large amount has been transferred from time to time among and is now held by a large number of persons. The bill avers that those becoming stockholders of the Northern Securities Company, whether for shares of the Northern Pacific Railway Company or the Great Northern Railway Company or for cash, had full knowledge and information of the purposes for which the [485] first-named company was organized, and the affidavits are conflicting on the question whether or not the nature and amount of the consideration for the issue or transfer of stock of that company can be traced and identified on its books or otherwise. It is manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence now before the court. They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master. It should also be borne in mind that this court, as a court of equity, has power so to mold its decrees and impose such terms as may be necessary to protect the equities of persons who may be affected by its action.

Language justly applicable to the present case was employed by Judge Sanborn in *Denver & R. G. R. Co. v. United States*, 124 Fed. 156, 161, 59 C. C. A. 579, 584, as follows:

"The case falls well within the established rule that a preliminary injunction maintaining the status quo may properly issue whenever the questions of law or of fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted."

An appeal does not lie from an interlocutory decree of this court denying a preliminary injunction. While this consideration is entitled to no weight where, on the application for an injunction, it clearly appears that the complainant cannot prevail on the final hearing, it is often of con-

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trolling importance where, on such application, there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought. Such refusal would not be an exercise of sound judicial discretion. It would not only be improvident in the extreme, but betray peculiar insensibility to the fallibility of human judgment so often accentuated by differences of opinion in even the highest judicial tribunals.

An interlocutory decree for a preliminary injunction may be prepared and submitted.

**[331] NORTHERN SECURITIES CO. v. HARRIMAN
ET AL.^a**

(Circuit Court of Appeals, Third Circuit. January 3, 1905.)

[134 Fed., 331.]

APPEAL—ORDER GRANTING PRELIMINARY INJUNCTION—REVIEW.—

Where the opinion of a Circuit Court in granting a preliminary injunction shows that the judge regarded as of controlling importance the fact that an order denying the injunction would not be reviewable by appeal, the rule that the appellate court will not interfere with the exercise of the discretionary power of the court of first instance unless there is strong reason for it does not apply, and the question of the right to the injunction will be determined on the merits.^b

CORPORATIONS—PURCHASE OF STOCKS—CONSTRUCTION OF CONTRACT.—

A contract by which defendant, the Northern Securities Company, acquired from complainants certain shares of stock of the Northern Pacific Railway Company, *held*, under the evidence, to have been one of purchase and sale, by which defendant, on payment of the agreed price, became the absolute owner of the shares, free from any trust in favor of the complainants, and free to distribute the same pro rata among all its stockholders upon the entry of a decree declaring it to be an illegal combination, and prohibiting it from voting or receiving dividends on such stock.

^a Circuit Court awarded a preliminary injunction restraining the Northern Securities Company from disposing of certain shares of the common stock of the Northern Pacific Railway Company (132 Fed., 464. See p. 587. Reversed by the Circuit Court of Appeals, Third Circuit (134 Fed., 331), which action was affirmed by the Supreme Court (197 U. S., 244). See p. 669.

^b Syllabus copyrighted, 1905, by West Publishing Co.

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SAME—MANNER OF DISTRIBUTING ASSETS.—Defendant corporation having been adjudged an illegal combination in restraint of interstate commerce, and enjoined from voting or receiving dividends on certain railroad stock which it owned, but permitted to transfer the same to its stockholders, a plan adopted by its directors and stockholders to distribute the same pro rata among all its stockholders was equitable, and its execution should not be enjoined.

APPEAL—ORDER GRANTING PRELIMINARY INJUNCTION—REVIEW.—It is a proper exercise of discretion for a court to grant a preliminary injunction where the bill and evidence present a prima facie case and raise important and doubtful questions of law and fact, and, unless the injunction is granted to preserve the status quo until the hearing, the suit would be ineffective; and an order for an injunction, granted on such grounds after the court has given due consideration to the balance of inconvenience and injury which may result to one party or the other, should not be reversed by an appellate court before the case has been finally heard and determined by the court below on full proofs. Per Gray, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Elihu Root and *John G. Johnson*, for appellant.

D. T. Watson and *Wm. D. Guthrie*, for appellees.

Before **ACHESON**, **DALLAS**, and **GRAY**, Circuit Judges.

DALLAS, Circuit Judge.

This is an appeal by the Northern Securities Company from a decree of the Circuit Court for the District of New Jersey awarding a preliminary injunction, by which that company was restrained from disposing of 717,320 shares of the common stock of the Northern Pacific Railway Company. It appears from the opinion of the learned judge of the court below that in granting this injunction he was materially influenced by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was just- [332] fied in requiring that the status quo should be preserved, and the subject-matter of the controversy be withheld from dissipation until the judgment of this court could be obtained. But now the substantial rights of the

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parties only need be considered, and whether the injunction should stand or be dissolved ought, in our judgment, to be determined upon the merits, and without further delay. *Western Union Telegraph Company v. Pennsylvania Railroad Company*, 123 Fed. 33-36, 59 C. C. A. 113. There have been cases, it is true, in which it has been held that, where the court of first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court, "unless there is some strong reason for it." *Massie v. Buck*, 128 Fed. 31, 62 C. C. A. 535. But to the circumstances of this case those rulings are inapposite. Attentive reading of the opinion of the learned judge of the Circuit Court has satisfied us that he regarded the fact that an appeal would not lie from a denial of the injunction as "of controlling importance," and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court; and we think that reason and justice demand that such an adjudication shall not be further postponed. The injunction complained of precludes the enjoyment of rights of ownership in property of great value. The facts upon which the propriety of upholding it depends are unquestionably disclosed in the record before us, and the principles by which the legality of the order awarding it must be tested are indubitable, and may be as readily applied now as at any time hereafter. The only substantial question is as to whether the decree below was accordant with law, and that question this court could not refuse to determine without, in effect, renouncing the appellate jurisdiction which Congress has expressly conferred upon it.

In November, 1901, the Northern Securities Company was incorporated under the laws of the state of New Jersey. Its total authorized capital stock was \$400,000,000, divided into 4,000,000 shares of the par value of \$100 each. The amount of the capital stock with which the corporation could commence business was fixed at \$30,000. Its duration was to be perpetual, and its objects were certified to be, *inter alia*, as follows:

"(1) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebted-

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ness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the state of New Jersey or of any other state, territory or country..

" (2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory or country, and, while owner thereof, to exercise all the rights, powers and privileges of ownership.

" (3) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory or country; and, while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

[333] The Securities Company was promptly organized in pursuance of its certificate of incorporation, from which the foregoing clauses have been extracted, and very shortly thereafter the associate stockholders of the Great Northern Railway Company transferred to the Securities Company a controlling interest in the capital stock of the Great Northern Railway Company upon an agreed basis of exchange of \$180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and the associate stockholders of the Northern Pacific Railway Company assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of \$115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company. For the stock of these railway companies, whether transferred as above stated, or subsequently acquired upon the same basis, and also for about \$7,522,000 paid to it in cash, the Securities Company issued its stock certificates in the following form:

Authorized Capital Stock, \$400,000,000.

No. _____ Shares.
Northern Securities Company.

Incorporated and Registered Under the Laws of the State of New Jersey.

This Certifies that _____ is the registered holder of _____ Shares of the Capital stock of the Northern Securities Company of One hundred dollars each, transferable only on the books of the company by the holder hereof, in person or by duly authorized attorney, upon surrender of this certificate.

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This certificate shall not become valid until countersigned by the transfer agent and also by the registrar of transfers.

In testimony whereof, the said company has caused this certificate to be signed by its President and Treasurer this _____ day of _____, A. D. 190-.

Treasurer.

President.

Countersigned this _____ day of _____, A. D. 190-.

Transfer Agent.

Countersigned and Registered this _____ day of _____, A. D. 190-.

MANHATTAN TRUST COMPANY.

Registrar of Transfers.

By _____,

Secretary.

Shares, \$100 each.

In March, 1902, a bill was exhibited by the United States, in the Circuit Court for the District of Minnesota, against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel Lamont. The object of this bill was to restrain the violation of the act of Congress of July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and the suit which it originated was so proceeded with that in April, 1903, the said Circuit Court adjudged and decreed:

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several states, such as an act of Congress approved July 2, 1890, entitled 'An act to [334] protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company now claimed to be held and owned by the defendant the Northern Securities Company was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several states; that the Northern Securities Company, its officers, agents, servants, and employes, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be, and they are hereby, respectively an-

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collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. * * *

Upon March 14, 1904, this decree was affirmed by the Supreme Court of the United States (193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679), and thereupon, viz., on March 22, 1904, the board of directors of the Securities Company adopted the following preambles and resolutions:

"Whereas, in the course of its business, this company has acquired and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company, and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

"Whereas, in a suit brought by the United States against this company, the said railway companies, and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company, held by this company; and

"Whereas, this company has issued, and there are now outstanding, 3,954,000 shares of its own capital stock; and

"Whereas, this company desires and intends to comply with the decree in the said suit fully and unreservedly, and without delay:

"Resolved, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders the shares of capital stock of said railway companies held by it.

"Resolved, That the board of directors of this company hereby declares it advisable that article (4th) of this company's certificate of incorporation be amended, so as to read as follows:

"Fourth.—The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars (\$3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars (\$3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars (\$100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the [335] shares held by him. Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents (\$39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents (\$30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of

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the stock of this company. The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.'

"*Resolved*, That a meeting of the stockholders of this company for the purpose of taking action upon the said alteration of the certificate of incorporation of this company, and also upon such other business as may come before the meeting, be, and is hereby, called, to be held at the general offices of this company in the city of Hoboken, county of Hudson, and state of New Jersey, at 11 o'clock a. m. on April 21, A. D. 1904."

Notice of a meeting of the stockholders of the Securities Company was accordingly given, and such meeting was duly held upon April 21, 1904. At that meeting the stock of the company was reduced 99 per centum, and the proposed pro rata distribution of the stock of the Northern Pacific Railway Company and of the preferred stock of the Great Northern Railway Company to and amongst the shareholders of the Securities Company was assented to. This was followed by the institution of the present suit, wherein the complainants alleged "that the defendant Northern Securities Company threatens and intends to distribute the shares of stock of each of said Great Northern and Northern Pacific Railway companies pro rata amongst its stockholders in disregard of the rights of your orators, and that, if said defendant Northern Securities Company be not enjoined from so doing by this court, such distribution will be forthwith made, and the stock of the Northern Pacific Railway Company belonging to your orators, and to which they are entitled, will be lost to your orators. * * * " The bill accordingly prayed for an injunction, and thereupon, and on affidavits and exhibits, the injunction now in question was awarded.

The appellees averred in their bill, and their counsel have contended in argument, that the shares of railway stock in question were acquired by the Securities Company under and subject to an alleged agreement (which will be presently more particularly referred to) that it would hold them "as custodian, depository, or trustee," and that the "legal and equitable owners of said shares of stock of said railway com-

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panies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns." On the other hand, the appellant, the Securities Company, insists that it acquired the railway shares referred to by absolute purchase thereof, and that consequently it became and now is vested with the equitable as well as the legal title thereto. The issue thus presented is of primary importance, and the proofs leave us in no doubt as to the facts upon which it must be determined. That the transaction, at least in [336] form, and *prima facie* in substance, was one of purchase and sale, is manifest. The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company was adopted by its board of directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was "to purchase said stock * * * at an aggregate price of \$91,407,500, payable, as to \$82,491,871 thereof, in the fully paid-up and nonassessable shares of the capital stock of this company at par, and as to \$8,915,629 in cash." It is obvious that this resolution contemplated a "purchase," and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company. The price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock, for which corporate certificates in the ordinary form were delivered and accepted. The cash so paid, which amounted to about \$7,522,000, was (as is stated in the bill) "used for the purchase of other property and for corporate purposes." The complainants received dividends upon the stock that was issued to them, which were paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock which it thereby pledged. It is claimed, however, that notwithstanding these facts the beneficial interest in the railway stock was not transferred to the

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Securities Company, because, as the appellees allege, the transfer was made under the terms of an agreement which they say was made by James J. Hill, J. Pierpont Morgan, and others, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the common capital stock of the Northern Pacific Railway Company, "to organize a holding company, * * * and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies, and control the operations and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company;" and that "in pursuance of said agreement said Northern Securities Company was organized, * * * and forthwith agreed to acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depository, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale; and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan & Co. to dispose of the Northern Pacific stock held by [337] the Oregon Short Line Company, and that "they further stated that, upon the organization of the proposed holding company," not that it would take as custodian or trustee, but that "they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line, and pay therefor in the stock of the holding company." These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a

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custodian or depository. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which, by executed contract of purchase, it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and admittedly that payment was made. The situation, then, is this: The Northern Securities Company is the owner of 1,537,594 shares of the stock of the Northern Pacific Railway Company, and 1,181,242 shares of the stock of the Great Northern Railway Company, which it has been restrained, at the suit of the United States, from voting or receiving dividends upon, and in view of this restraint all parties agree that it should not continue to hold them. It accordingly proposes to assign them pro rata to its shareholders, including not less than 2,500 persons, whose shares were unquestionably acquired by purchase, and who are not parties to this suit; and as such disposition of them would effect a ratable, and therefore equitable, division of them amongst all who are entitled to participate in a distribution of the corporate assets, we are of opinion that the injunction which prohibited it should no longer remain in force.

If the question before us had been involved and decided in the suit of the *United States v. The Northern Securities Company*, or if it had been passed upon, though but incidentally, by the Supreme Court of the United States in disposing of the appeal in that case, we, of course, would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation. The petition or bill of the United States did pray, *inter alia*, that the stockholders of the railroad companies who had exchanged their stock therein for stock of the Northern Securities Company

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should be required to surrender any stock of the Northern Securities Company so acquired and held by them, and to accept therefor the railway stock "in exchange for which the same was issued;" but the decree, in so far as it was mandatory, went no further than to prohibit the doing of "the specific things which, being done, would effect the result denounced by the act." 193 U. S. 356, 24 Sup. Ct. 465, 48 L. Ed. 679. This was all that was requisite, and it was accomplished by that part of the decree which has been already quoted; and the added clause, though apparently suggested [338] by the prayer of the bill to which we have referred, was obviously not intended to have any obligatory effect. It was permissive merely, and this so plainly appears from its terms that it is necessary only to direct attention to them. They are: "But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignment of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies." This decree was affirmed in its entirety, and without modification, and thereafter the three principal complainants in the present case applied to the Circuit Court for the District of Minnesota for leave to intervene in the suit in which it had been made. The ground of that application was substantially the same as that upon which this bill is founded; but in denying it the court said:

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued and to surrender the stock of the two railway com-

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panies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to command stockholders of the Securities Company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The government was satisfied with the relief which it obtained, and expresses itself as fully satisfied therewith at the present time. * * * It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become the owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be returned, or exclude other methods of disposing of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance, and make an order which we expressly, and on full consideration, declined to make when the decree was entered. This we must decline to do."

The facts which have been mentioned negative the contention that the question here in dispute was adjudicated in the government suit, and the further contention that it was at least authoritatively dealt with in the principal opinion rendered upon the appeal in that case is, we think, likewise fallacious. Some phrases in that opinion, if considered separately, and without reference to the precise subject which was under investigation, may seem to sanction the interpretation which the appellees have sought to put upon it; but when it is read as a whole it becomes quite evident that it was not intended to resolve any question other than that which was before the court. The decree that was under review had enjoined the Securities Company from using the railway shares in furtherance of the scheme declared to be

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unlawful, but, as we have seen, the right of property in those shares was not at all affected by that decree.

"The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation, as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished: left undisturbed, the act in question will be valueless for any practical purpose." 193 U. S. 357, 24 Sup. Ct. 465, 48 L. Ed. 679.

We have been asked to infer from this statement in the opinion that the learned justice who made it intended to affirm that the property interests of the original holders of the railway shares had not been transmuted by their assignment; but no such inference would be warranted. He was not dealing with conflicting claims of title, but with the decree of the Circuit Court; and the plain and natural meaning of the language used is that by that decree no property interests had been disturbed. As was said by the learned judges who made it:

"When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able, and likewise disposed, to make some disposition of the stock which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject-matter of an independent suit between the parties immediately interested."

The present suit is an independent one, and, as its subject-matter is distinctly different from that of the suit in which the United States was complainant, the duty of this court to independently consider it has seemed to us to be both plain and imperative.

The conclusions reached upon the questions we have discussed render it unnecessary for us to express any opinion upon the other points argued by counsel. From what has been said it follows that the decree of the Circuit Court must be reversed, and therefore it is so ordered.

Gray, J., dissenting.

[340] GRAY, Circuit Judge (dissenting).

I am constrained to dissent from the judgment of the majority of the court. I do not think the learned judge of the court below exercised other than a sound judicial discretion in granting the motion for a special injunction, *pendente lite*. He has stated in his opinion that important and doubtful questions of law and fact had been raised by the pleadings and affidavits, and I cannot agree that these questions should have been so determined by him on a motion for a preliminary injunction, as to make necessary the dismissal of the bill. I say, to make necessary the dismissal of the bill, because it is apparent that, to have denied the injunction *pendente lite*, and thus to have permitted the distribution of the stocks of the Northern Pacific and Great Northern, in the custody and control of the defendant company, according to the plan proposed, would have practically frustrated the object of the suit, and have rendered unavailing a decree, as prayed for, in favor of complainants. Nothing but a clear conviction that complainant's bill was without equity, and should therefore be dismissed without further hearing, would have justified the court below in refusing the preliminary injunction. On the other hand, if the court were satisfied that a *prima facie* case had been presented by complainants, and that the balance of advantage or disadvantage to result to the parties respectively from the granting or withholding an injunction was such as to sanction such action, it was the exercise of a sound judicial discretion to grant the injunction and preserve the status quo, until there was opportunity, after full hearing, in the orderly progress of the suit, to consider, with the deliberation they demanded, the questions of law and fact raised by the pleadings and evidence in the case. The responsibility for the exercise of this power and duty rested upon the court below.

Upon appeal from an order granting a preliminary injunction, a reviewing court is not called upon, ordinarily, to enter into and decide the merits of the case, and unless the court below, in granting the preliminary injunction, has violated some rule of equity or abused its discretion, or acted improvidently, this court should not interfere with

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its discharge of the responsibility and duty imposed upon it. "The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is, not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and violated the rules of law which should have guided their action." That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrammelled opportunity he sought, for a full hearing and deliberate investigation of what he has stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial system, by not depriving the parties, or a reviewing court, of the benefit to result from the examination and judgment of a court of first instance. This salutary feature of our system would be measurably lost, if the right to appeal from an interlocutory [341] decree for a special injunction, given by the act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of questions arising on motions for such injunctions. I cannot accept the view, that it is our duty in the case at bar to do more than merely determine whether the sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I do not think that the established general rule of appellate courts requires more than this, and I think we can conform to this general rule "without in effect renouncing the appellate jurisdiction conferred upon us by Congress."

As I am clearly of the opinion that the court below, in granting the special injunction, *pendente lite*, has given due consideration and effect to the balance of inconvenience and injury which may result to one party or the other, and that the *prima facie* case was sufficiently established at the hearing

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to entitle the complainants to the protection of such an injunction, I am in favor of affirming the interlocutory decree.

[464] RICE v. STANDARD OIL CO.

(Circuit Court, D. New Jersey. January 6, 1905.)

[134 Fed., 464.]

MONOPOLIES—ACTION FOR VIOLATION OF ANTI-TRUST ACT—PLEADING.—

Section 1 of the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), which declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations," makes a distinction between a contract and a combination or conspiracy in restraint of trade, and a declaration in a suit based on section 7 (26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]) to recover damages resulting to plaintiff from a violation of such provision, which alleges in a single count that defendant entered into a "contract, combination, and conspiracy" in restraint of trade, is bad for duplicity.^a

[465] **SAME.**—A declaration in an action brought under section 7 of the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]) to recover damages for a violation of section 1 of the act, construed, and *held* bad for indefiniteness and uncertainty in describing the alleged combination and conspiracy entered into by defendant and the acts done which resulted in damage to plaintiff.

At Law. On motion to strike out declaration.

Charles W. Fuller and *R. V. Lindabury*, for the motion.

• *Charles E. Hendrickson, Jr.*, and *John Griffin*, opposed.

LANNING, District Judge.

This matter comes before the court on a motion to strike out the plaintiff's declaration on the ground that it is irregular and defective, and so framed as to prejudice, embarrass, and delay a fair trial of the action. Such procedure is warranted by section 110 of the New Jersey practice act (P. L. 1903, p. 569). The cause of action set forth in the declara-

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tion is supposed to be created by section 7 of the Sherman anti-trust act, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890. Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]. That section is as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the costs of suit, including a reasonable attorney's fee."

Amongst the things by the act declared to be unlawful are those mentioned in its first section (26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), which is as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

It is apparent that mere proof that the defendant has entered into a contract or engaged in a combination or conspiracy in restraint of trade or commerce among the several states will not be sufficient to support a cause of action under the seventh section, for there must, in addition thereto, be proof that the plaintiff has, by reason thereof, sustained damage. In his declaration, therefore, the plaintiff must aver not only facts showing such a contract or combination or conspiracy as is declared by the act to be unlawful, but facts showing that by reason of such unlawful thing he has been injured in his business or property.

It is further apparent that the act makes a distinction between a contract and a combination or conspiracy. In his dissenting opinion in *Northern Securities Co. v. United States*, 193 U. S. 197, Mr. Justice Holmes, after quoting the words of the first section of the act, at page [466] 403, 24 Sup. Ct. 436, page 469, 48 L. Ed. 679, said: "The words hit two classes of cases, and only two—contracts in restraint of trade, and combinations or conspiracies in restraint of trade." Each of these things the act condemns as an unlaw-

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ful thing. They are not confused in the act, but are mentioned as distinct offenses. Good pleading, whether it be in an indictment in a criminal proceeding or in a declaration in a civil suit, requires the same distinction to be observed. If in a single count in an indictment the charge should be that the defendant entered into a contract, combination, and conspiracy in restraint of trade or commerce among the several states, it would be bad for duplicity. Compare *United States v. Cadwallader* (D. C.) 59 Fed. 677. So, in a declaration in a civil suit the confusion of the two condemned things in one count must likewise be irregular and defective for duplicity. In one count there may be a charge of an unlawful contract, and in another a charge of an unlawful combination or conspiracy, but the two unlawful things cannot be declared upon as synonymous terms and charged in a single count.

In the declaration now before me the plaintiff sets forth by way of inducement that from 1876 to 1904 he was a refiner of crude petroleum, and a manufacturer of the refined products of crude petroleum; was engaged in trade and commerce among the several states of the United States, selling his manufactured products refined by him from crude petroleum to the citizens of Mississippi and Louisiana, and a large number of other states specifically named, at prices profitable to him, and shipping the same to his customers in those states from his refinery at Marietta, Ohio, by certain common carriers, namely, the Cincinnati, Washington & Baltimore Railroad Company, and a large number of other railroad companies specifically named, and was lawfully entitled to ship and deliver his products to his customers over the railroads of these common carriers for a reasonable fee or reward to be paid by him or his customers to these common carriers; that More, Cox & Lee, of Columbus, Miss., and Richard M. Ong, of New Orleans, La., and 4,000 other persons in the various states named, became and were his customers of products shipped over the railroads of the common carriers specifically named, and that he had made contracts with his customers yielding him a profit of \$50,000 per year, which they would have continued except for the

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wrongful acts and misconduct of the defendant and its associates; that he was possessed of a plant, refinery, and business of the value of seven hundred and fifty thousand dollars; that on January 2, 1882, the individuals, firms, and corporations mentioned in a certain written contract annexed to the declaration, and forming part thereof, and marked "Schedule A," were engaged in lawful competition with the plaintiff and among themselves in the same line of business as that carried on by the plaintiff; that, in order that a combination of these individuals, firms, and corporations might be formed to put an end to competition and injure and destroy the plaintiff's business and the business of others engaged in the same line throughout the United States, and drive the plaintiff and others out of competition with them, and unlawfully secure for themselves the customers who theretofore had traded or might thereafter trade with the plaintiff and others, those individuals, firms, and corporations entered into the above-mentioned contract; and that on January 4, 1882, they entered into a further written contract supplemental to the contract of January 2, 1882, which supplemental contract is also annexed to the declaration as a part thereof, and marked "Schedule B." The plaintiff then avers that in pursuance of these two contracts, and as a part of the scheme of the individuals, firms, and corporations mentioned in them, the defendant, on August 1, 1882, was incorporated under the laws of the state of New Jersey with a capital of \$3,000,000, under the name "Standard Oil Company of New Jersey;" that on June 14, 1889, the name of the company was changed to "Standard Oil Company," and its capital stock increased to \$110,000,000; and that the defendant, from the date of its said incorporation down to the time of the commencement of this suit, joined and co-operated with the several individuals, firms, and corporations mentioned in the two contracts in a general plan or scheme to destroy the plaintiff's business, to render his plant worthless, to secure for themselves his customers, and to destroy competition and create a monopoly "by the actings and doings and in manner and form as hereinafter stated."

The first series of averments concerning these "actings

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and doings," which, for convenience of reference, I have designated by numbers, is as follows:

"(1) On the 4th day of August, 1882, at Trenton, in said district, the defendant entered into and became a party to said two contracts aforesaid, which said contracts were and are in restraint of trade and commerce among the several states of the United States; and (2) likewise, to wit, on the day and year last aforesaid, at Trenton, aforesaid, entered into a combination in the form of a trust and conspiracy in restraint of trade and commerce among the several states of the United States with respect to business of the character of the plaintiff's aforesaid; and (3) pursuant to the true intent and purpose of said contracts, combination and conspiracy, together with the other persons, parties to said agreement, from the day and year last aforesaid, continuously, day by day, down to the day of the commencement of this suit, did, together with other persons, parties to said agreements hereto annexed as Schedules A and B, conspire with, coerce, intimidate, and induce the above-named common carriers (4) to discriminate against the plaintiff in the matter of freight or carriage charges, (5) and to charge the said plaintiff and his customers unreasonable, excessive, and exorbitant sums of money as fee or reward for the carriage and delivery of the plaintiff's products aforesaid to the customers of the plaintiff aforesaid, to wit, from fifty per cent. to three hundred and thirty-three per cent. more than reasonable fee or reward for such carriage and delivery, and to discriminate in favor of defendant and its associates aforesaid by charging said defendant and associates for like carriage and delivery unreasonably small sums, considerably less than proper charges as fees or rewards to be paid in that behalf by the said defendant and its associates aforesaid to the common carriers aforesaid, (6) and to charge the said plaintiff from fifty per cent. to three hundred and thirty-three per cent. more for freight or carriage charges for transporting the same amount of the plaintiff's refined oils the same distance to the same points and under the same conditions as charged the said defendant and its associates aforesaid; and (7) in many cases causing and compelling [grammatically, the language should evidently be "to cause and compel"] said common carriers to pay to said defendant and its associates aforesaid the excess of freight charges charged the plaintiff over and above the rate charged the defendant and associates aforesaid, or some part thereof, thereby taking from the plaintiff his money to enable said defendant to oppress and injure the plaintiff in other ways, and to enable the said defendant and its associates aforesaid to recoup the losses, or some part thereof, sustained by it and them by reason of its and their selling oil like the [408] plaintiff's at prices netting a loss for the purpose of destroying the plaintiff's market for his oils and the value of oil in the plaintiff's market as hereinafter stated."

These averments, in my judgment, are bad for duplicity and uncertainty. The first clause relates exclusively to the two contracts, copies of which are annexed to the declaration. The second clause relates to what is called "a combination in the form of a trust and conspiracy." In the third clause it is averred that "pursuant to the true intent and purpose of said contracts, combination, and conspiracy" the defendant did certain things to the injury of the plaintiff. Here

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the pleader makes the two distinct offenses condemned by the act the basis of his complaint. This contravenes the rule which forbids duplicity in pleading. But the averments are also bad for indefiniteness and uncertainty. The third clause, particularly, is badly framed. It avers that the defendant, with other persons, did "conspire with, coerce, intimidate, and induce the above-named common carriers" to do the acts mentioned in the fourth, fifth, sixth, and seventh clauses. As the conspiracy, coercion, intimidation, and inducement are declared to have been pursuant to the true intent and purpose of the contracts, combination, and conspiracy mentioned in the first and second clauses, the fourth, fifth, sixth, and seventh clauses must be held to relate, not to an additional conspiracy, but to acts done to give effect to the contracts, combination, and conspiracy mentioned in the first and second clauses, and thus to injure the plaintiff in his business or property. When so read, we find that we have no information concerning the combination and conspiracy mentioned in the second clause, except that the combination is in the form of a trust, and that the combination and conspiracy are in restraint of trade. When they were formed, or how, or by whom, or for what purpose, is not stated. The defendant cannot be required to plead to averments that are so general and indefinite. The fourth clause is to the effect that one of the acts done was "to discriminate against the plaintiff in the matter of freight or carriage charges." This also is too general and indefinite to comply with the rules of good pleading. The fifth clause, which relates to alleged unreasonable freight rates charged against the plaintiff and his customers, is necessarily defective because of its connection with the preceding clauses. Whether it is further defective because it states none of the customers of the plaintiff against whom unreasonable charges were made, or because no facts are stated tending to show what would be reasonable rates, are questions that need not now be considered. The great difficulty, if not impossibility, of formulating a rule which shall govern in the matter of determining what are reasonable rates for transportation was commented on in *United States v. Freight Association*, 166 U. S., at pages 331 and 332, 17 Sup. Ct. 540, 41 L. Ed. 1007.

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Possibly, the sixth clause might stand if the clauses with which it is connected were not defective. The seventh clause is too indefinite, because it relates to "many cases" in which it is said that common carriers were compelled to pay to the defendant and its associates the excess of freight charges collected from the plaintiff, without the averment of any fact tending to show when, where, with whom, or in what circumstances any such case arose. The next averment in the declaration is as follows:

[469] "And the said defendant and its associates aforesaid did also conspire with, cause and compel the railroads and other common carriers aforesaid and their employes to harass the plaintiff in his business by delaying to furnish cars and to promptly ship the plaintiff's oil sold by the plaintiff to his customers."

This averment deals with a conspiracy separate and distinct from that alleged in the preceding averments. There is no mention of any time when the alleged conspiracy was entered into, or when the alleged acts were done. The defendant's counsel have argued that it should be read in connection with the preceding averments, and that it must be understood to relate to the time which in the preceding averment is said to have been "from the day and year last aforesaid continuously, day by day, down to the day of the commencement of this suit." But the language employed will not permit such a reading. The same thing is true of each of the succeeding averments concerning alleged conspiracies. Other defects appear in the conspiracy averments. For example, it is said that the defendant conspired with the other persons, parties to the two agreements above mentioned, to cause the plaintiff's customers to cease purchasing his oil by furnishing oil like the plaintiff's product "to other dealers in localities where the plaintiff was selling oil to his customers at prices netting a loss to said defendant and its associates." But no dealer or locality is named where oil was thus supplied by the defendant, notwithstanding, if the averment be true, the plaintiff must have knowledge as to who the dealers were and as to the localities in which those dealers carried on their business. Another averment is that:

"The said defendant and its associates aforesaid also, in pursuance of said conspiracy, sought out and sold oil to the plaintiff's customers

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at prices less than cost, while keeping the price of oil to the defendant's and its said associates' customers in the same localities up to prices showing large net profits on sales, which facts were unknown to the customers of defendant and its associates aforesaid, thereby causing the plaintiff's customers to leave the plaintiff, and trade with the defendant and its associates aforesaid."

But the plaintiff fails to name any of his customers who were thus sought out or to whom oil was sold at prices less than cost. Another averment is that in further pursuance of the alleged conspiracy the defendant did "intimidate the customers of the plaintiff by threatening to boycott them in their business if they purchased oil of the plaintiff." But the plaintiff fails to name any of his customers who were thus intimidated. The next two averments are to the effect that the defendant and its associates "did also operate retail stores for the sale of groceries, oil, and other commodities in localities where retailers banded together and agreed to purchase and did purchase oil of the plaintiff, for the purpose of injuring such retailers and customers of the plaintiff by destroying their grocery or other business so long as they should buy oil of the plaintiff," and that they also sold groceries and merchandise "to the customers of the plaintiff's customers at such ruinous prices as to threaten ruin and loss to the plaintiff's customers." But the plaintiff fails to name any of his customers who were thus affected. Another averment is that the defendant and its associates "bribed and bought out the plaintiff's sales agents, and caused the plaintiff's agents [470] and employés to betray the trust confided to them by the plaintiff in his said business, and to wrongfully abandon the plaintiff's service and disregard their duty to the plaintiff in the course of his business." But none of the plaintiff's agents thus alleged to have been bribed or to have betrayed their trust is named. The next averment is that the "defendant and its associates intimidated merchants and others engaged in the business of selling oil in various markets, and thus prevented such merchants and others from purchasing and dealing in oil manufactured by the plaintiff." The plaintiff has failed to name any merchant or other person thus intimidated, or what the acts of intimidation were, or any of the markets in which such practice was carried on. The last averment is that the defendant

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and its associates "hampered the plaintiff in getting the necessary supplies of crude oil, and made the said crude oil more expensive to the plaintiff, and hampered, delayed, and made more expensive the work of the plaintiff in the construction of the pipe line for his use." But there is no averment as to the manner in which the defendant and its associates thus hampered, delayed, or injured the plaintiff.

It seems to me clear that the averments in the declaration are too vague to give to the defendant the information to which it is entitled before being required to plead. A declaration which was much less indefinite than the one before me was, in the case of *Minnuci v. Philadelphia & Reading R. R. Co.*, 68 N. J. Law, 432, 53 Atl. 229, declared to be one which would have been stricken out on motion for that purpose. The same thing was true of the declaration in the case of *Race v. Easton & Amboy R. R. Co.*, 62 N. J. Law, 536, 41 Atl. 710. See, also, *Ackerman v. Shelp*, 8 N. J. Law, 125; *Stephens & Condit Transp. Co. v. Central R. R. Co.*, 34 N. J. Law, 280.

In my opinion, the motion to strike out the declaration must be granted, and an order to that effect will be signed.

[375] SWIFT AND COMPANY v. UNITED STATES.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

No. 103. Argued January 6, 7, 1905.—Decided January 30, 1905.

[196 U. S., 375.]

A combination of a dominant proportion of the dealers in fresh meat throughout the United States, not to bid against, or only in conjunction with, each other in order to regulate prices in and induce shipments to the live stock markets in other States, to restrict shipments, establish uniform rules of credit, make uniform and improper rules of cartage, and to get less than lawful rates from railroads to the exclusion of competitors with intent to monopolize commerce among the States, is an illegal combination within the meaning and prohibition of the act of July 2, 1890, 26 Stat. 209, and can be restrained and enjoined in an action by the United States.

* Demurrer overruled and preliminary injunction granted by the Circuit Court (122 Fed., 529). See p. 237.

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It does not matter that a combination of this nature embraces restraint and monopoly of trade within a single State if it also embraces and is directed against commerce among the States. Moreover the effect of such a combination upon interstate commerce is direct and not accidental, secondary or remote as in *United States v. E. C. Knight Co.*, 156 U. S. 1.

Even if the separate elements of such a scheme are lawful, when they are bound together by a common intent as parts of an unlawful scheme to monopolize interstate commerce the plan may make the parts unlawful.

When cattle are sent for sale from a place in one State, with the expectation [376] they will end their transit, after purchase, in another State, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a constantly recurring course, it constitutes interstate commerce and the purchase of the cattle is an incident of such commerce.

A bill in equity, and the demurrer thereto, are neither of them to be read and construed strictly as an indictment but are to be taken to mean what they fairly convey to a dispassionate reader by a fairly exact use of English speech.^a

[49 L. ed., 518.] ^b

[A general allegation of intent may color and apply to all the specific charges of a bill which seeks relief against alleged violations of the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies.]

[A bill charges a violation of the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies, as against the objections of want of equity, multifariousness, and failure to set forth sufficient definite or specific facts, where it avers the existence of a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live-stock markets of the different states, to bid up prices for a few days in order to induce shipments to the stock yards, to fix selling prices, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and to secure less than lawful freight rates, to the exclusion of competitors.]

^a The foregoing syllabus and the abstracts of arguments copyrighted, 1905, by The Banks Law Publishing Co.

^b The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 49, p. 518. Copyrighted, 1904, 1905, by The Lawyers' Co-Operative Publishing Co.

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[A combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the states, to restrict the competition of their respective agents when purchasing stock for them in the stock yards, is an interference with interstate commerce, forbidden by the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies, where such dealers and their slaughtering establishments are largely in different states from those of the stock yards, and the sellers of the cattle largely in different states from either.]

[Trade in fresh meat is sufficiently shown to be commerce among the states, protected from restraint by the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), by allegations in a bill charging meat dealers with violations of that act, which, even if they import a technical passage of title at the slaughtering places in cases of sales, also import that the sales are to persons in other states, and that the shipments to other states are pursuant to such sales, and by allegations charging sales of such meat by their agents in other states, which indicate that some, at least, of the sales were in the original packages.]

[Vagueness can not be asserted of a charge in a bill seeking relief against an attempt to monopolize commerce in fresh meat among the states, in violation of the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), that a combination exists among independent meat dealers to restrain their respective agents from bidding against each other when purchasing live stock for them in the stock yards.]

[Interstate commerce is unlawfully restrained, in violation of the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), by a combination of independent meat dealers, in aid of an attempt to monopolize commerce in fresh meat among the states, to bid up prices for live stock for a few days at a time, in order to induce cattle men in other states to make large shipments to the stock yards, or by a combination for the same purpose to fix the selling price of fresh meat, and to that end to restrict shipments, when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, or by a combination in aid of such purpose to make uniform and improper charges for cartage for the delivery of meat sold to be shipped to dealers and consumers in the several states.]

[A combination to secure less than lawful freight rates, entered into by independent meat dealers with the intent to monopolize commerce in fresh meat among the several states, is forbidden by the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), to protect trade and commerce against unlawful restraints and monopolies.]

Argument for appellants.

THE facts are stated in the opinion.

Mr. John S. Miller, with whom *Mr. Merritt Starr* was on the brief, for appellants:

The charges in each of the paragraphs or counts of the bill or petition of alleged violations of the Sherman Act are, respectively, mere statements of legal conclusions. Each is bad on demurrer for that reason.

These charges would be bad on that ground, even in an indictment under this act. *In re Greene*, 52 Fed. Rep. 104; *United States v. Cruikshank*, 92 U. S. 542, 563; *United States v. Simmons*, 96 U. S. 360; *United States v. Carll*, 105 U. S. 611; *United States v. Britton*, 107 U. S. 655; *Hazard v. Griswold*, 21 Fed. Rep. 178. And *a fortiori* are they bad in a bill or petition in equity, which is required to state the facts essential to the cause of action. *Lawson v. Hewell*, 118 California, 613; *Wright v. Dame*, 22 Pick. 59; *Ambler v. Choteau*, 107 U. S. 586; *Van Weel v. Winston*, 115 U. S. 228, 237; 1 Foster Fed. Prac. § 67.

The facts alleged are looked at and not adjectives or adverbs or epithets. *Maguiac v. Thompson*, 2 Wall. Jr. 209; *Price v. Coleman*, 21 Fed. Rep. 357; *Van Weel v. Winston*, and *Ambler v. Choteau*, *supra*.

The importance of applying this rule with strictness here is more marked because answer by the defendants under oath is called for. This point is properly raised by demurrer. 1 Daniel Ch. Pr. 372. It was so raised in *Van Weel v. Winston*, *supra*.

The decree complained of, which is merely one of injunction, is erroneous on like grounds of indefiniteness. *Laurie v. [377] Laurie*, 9 Paige, 234, 235; *Robinson v. Clapp*, 65 Connecticut, 365; *Whipple v. Hutchinson*, 4 Blatchf. 190.

It makes clear the misconception of the Sherman Act and of Federal power to regulate commerce upon which the bill and decree proceed. They appear to go upon the theory that under the act of Congress the Federal courts are to regulate commerce, and the decree enjoins, not specific acts, but violations of the statute in terms as general as the act of Congress itself. A defendant cannot know from its terms what he

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may or may not do without making himself liable as in contempt.

This makes the insufficiency of the bill more obvious, as no valid decree could have been entered upon its allegations.

The provisions of the Sherman Act do not contemplate such a general proceeding or decree to interfere in advance with future dealings, as interstate commerce, which may be interstate trade or may be domestic trade according to the future and changeable intention of the dealers. *United States v. E. C. Knight Co.*, 156 U. S. 1, 15.

The business of defendants of purchasing live stock and of selling fresh meats produced therefrom, as described in the bill, is not, upon the allegations of fact in the bill, interstate or foreign commerce.

The purchase of cattle as alleged and described in the first paragraph of the bill is not alleged or shown to be interstate commerce.

The business of defendants of selling such fresh meats, at the several places where they are so prepared, as described in the second paragraph, is not, under the facts there alleged, interstate trade or commerce. The sales and deliveries, although to dealers in other States and Territories, are there alleged to be made at the places where the meats are prepared by defendants, and are domestic sales.

The deliveries by defendants to the carriers, who are agents of the purchasers in that respect, under the allegations of the bill, are deliveries to the purchasers in the State where the sale is made; and the sales and deliveries are there fully completed. [378] *Merchant v. Chapman*, 4 Allen, 362; *Orcutt v. Nelson*, 1 Gray, 543; *Waldron v. Romaine*, 22 N. Y. 368; *Ramsey & Gore Co. v. Kelsea*, 55 N. J. L. 320; *Cotte v. Harden*, 4 East. 211; *Brown v. Hodgson*, 2 Camp. 86; *Groning v. Needham*, 5 Maule & S. 189; 2 Kent. Com. 499; *Crossman v. Lurman*, 192 U. S. 189, 198.

The sellers' act in delivering the merchandise to the common carrier, or carrying the merchandise to the carrier's depot (if that is taken to be in effect alleged), is not any part of the interstate transportation, and does not make the goods the subject of interstate commerce. *Coe v. Errol*, 116 U. S. 517, 528.

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The fact that the sale is made with a view to the goods being transported by the buyer's agent to another State after the sale and delivery is fully completed, does not make the sale interstate commerce.

The sales alleged in the third paragraph of the bill, by agents of the owners in other States and Territories to whom the owners of the fresh meats have shipped the same for sale there by such agents on the ground, are not incidents of interstate commerce. *Coe v. Errol*, 116 U. S. 517, 525; *Kidd v. Pearson*, 128 U. S. 1, 23; *United States v. E. C. Knight Co.*, 156 U. S. 1, 13, 17; *Austin v. Tennessee*, 179 U. S. 343; *Crossman v. Lurman*, 192 U. S. 189, 198; *Am. Harrow Co. v. Shaffer*, 68 Fed. Rep. 750; *Stervens v. Ohio*, 93 Fed. Rep. 793.

Under the allegations here in question, it is to be taken that the meats, before the sales here referred to are made, have come to their place of rest and are at rest for an indefinite time awaiting sale at their place of destination, and are a commodity in the market where the sales are made; and that the sales are not in the "original packages"; and that the meats, at the time of the sales, have become a part of the general property in the State where sold, and are there handled and sold as such. *Southern Coal Co. v. Bates*, 156 U. S. 577, 588; *Brown v. Houston*, 114 U. S. 623, 632; *Emert v. Missouri*, 156 U. S. 296, 310; *Singer Mfg. Co. v. Wright*, 97 Georgia, 123.

The point here made is entirely consistent with the rulings [379] in many cases, that the owner of merchandise, who transports it from one State to another for sale, has a right (which cannot be interfered with by state or municipal laws) to sell it as an article of interstate commerce. He also has a right to make such article part of the general property of the State into which it is taken, and he then has the right to sell and others have the right to purchase it as an article of domestic commerce, which cannot be interfered with by Federal law. The Sherman Act does not seek to and could not interfere with that right. *United States v. E. C. Knight Co.*, 156 U. S. 1, 15, and *Kidd v. Pearson* and *Veazie v. Moor*, there cited. But this bill here does seek to interfere with that right. Again, the point here made is not touched by the line of decisions holding that state or municipal laws are

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invalid, which, by taxation or other regulations, discriminate against merchandise brought from another State, or seek to prevent interstate commerce therein,—such as *Welton v. Missouri*, 91 U. S. 465; *Walling v. Michigan*, 116 U. S. 446; *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Reberman*, 138 U. S. 78, and *Schollenberger v. Pennsylvania*, 171 U. S. 1, 24, 25.

The bill of complaint does not show any contract, combination or conspiracy in restraint of interstate trade or commerce within the meaning of the Sherman Act.

It does not allege any acts of defendants monopolizing or attempting to monopolize or combining or conspiring to monopolize such trade or commerce.

If the act in question be given a construction which would sustain this bill of complaint, the statute would be unconstitutional.

The alleged offenses complained of are set forth in the sixth, seventh, eighth, ninth, tenth and eleventh paragraphs of the bill. As to the sixth and seventh paragraphs we maintain: The allegations of combination and conspiracy here are of mere legal conclusions. That the purchases of live stock referred to in the sixth and seventh paragraphs, as therein alleged, are not interstate commerce.

[380] The first paragraph of the bill in which the business of purchasing live stock for slaughter is set forth and described, does not allege or show that the business is interstate commerce.

The description of the live stock in the sixth paragraph, as live stock produced and owned principally in other States and Territories, and shipped by the owners to the places where sold, for sale to persons engaged in producing and dealing in fresh meat, does not show that the sales of the live stock are interstate commerce. The live stock, when offered for sale in the pens of the stock yards, are, under the allegations of fact in the bill, to be considered as having become part of the general mass of property of the State where offered for sale. The defendants purchasing the live stock have the right so to treat and deal therewith. *Brown v. Houston*, 114 U. S. 622, 632; *Pittsburgh Coal Co. v. Bates*, 156 U. S. 577, 588, 589; *Emert v. Missouri*, 120 U. S. 489, 497. When purchased,

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the live stock is, under the allegations of this bill, at rest for an indefinite time, awaiting sale at its place of destination. *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 92.

The defendants have as much right, then, to treat and deal with and purchase such live stock as an article of domestic commerce as the State has so to treat it for the purposes of taxation or regulation. This bill seeks to interfere with that right under the Sherman Act.

If the sworn allegations of the bill in this respect were to be supplemented by other facts, as matters of common knowledge, with respect to the situation of the live stock when sold, such as appeared in the Hopkins and Anderson cases, the case of the Government would be no better. It would then appear that the cattle and other live stock are shipped to commission merchants at the stock yards; are then placed in the pens of the stock yards companies, and there held, cared for and fed by the stock yards company for the account of the commission merchants, and under the allegations here it must be taken that their bulk is broken up; they are divided into lots and sold and delivered by the commission merchant as the principal or [381] owner thereof, and so are not purchased as articles of interstate commerce.

But if these purchases of live stock are interstate commerce, the acts alleged in the sixth and seventh paragraphs are not violations of the Sherman Act. *Hopkins v. United States*, 171 U. S. 591; *Anderson v. United States*, 171 U. S. 604. They are the exercise of a constitutional right of defendants to control their own business.

There is nothing in the bill to show the proportion of the entire number of head of live stock offered for sale at the markets in question, which is bought by the defendants for the purposes of the production of fresh meat; and so there is nothing to show anything like monopoly or attempt at monopoly of the live stock purchases by the defendants.

There is nothing in the bill to show any attempt on the part of the defendants to control or affect the purchases or business in the purchases of live stock of any other persons than themselves. The alleged combinations by defendants in the sixth and seventh paragraphs charged have to do merely with their own business conduct in themselves buying live stock,

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or determining how much they shall buy, at private sale for consumption in their own private business.

The combination charged in the sixth paragraph, for directing their respective purchasing agents "to refrain from bidding against each other, except perfunctorily, and without good faith," does not allege a combination to restrain trade; or even a combination to refrain from bidding. A perfunctory bid, made without good faith, is one which the seller could accept and enforce.

The alleged combination in the seventh paragraph, "for bidding up, through their respective purchasing agents, the prices of live stock for a few days at a time at the said stock yards and open markets," does not charge a combination to restrain trade.

These alleged combinations do not have the direct and immediate effect of restraining interstate commerce, but their [382] effect, if any, upon interstate trade in live stock is indirect and incidental, within the meaning of the decisions of this court. The effect is not near so direct or immediate as the mutual agreement of the traders who were members of the Traders' Exchange in the Anderson case.

Obviously the supply of live stock for fresh meat greatly varies in the market at different seasons and times, while the demand for fresh meats for human consumption, for which defendants purchase such live stock, is comparatively constant and uniform.

It is a public benefit and not a public evil that defendants should always be able to supply such constant demand for their fresh meats, and that at the same time they should not overstock the market with their perishable meats. This makes it proper that they should act with some concert and common understanding in their purchases of live stock for that purpose.

As to the eighth paragraph we contend: The allegation of combination and conspiracy is of a mere legal conclusion, and insufficient. The sales of fresh meats by agents of defendants, as there described, under the facts alleged, are not interstate commerce. But if it be interstate commerce, no violation of the Sherman Act is thereby shown.

No criminal conspiracy is alleged. The charge there is not

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of a combination or conspiracy to restrain trade (~~which the~~ statute forbids), but is of a combination or conspiracy to do a lawful act, the exercise of a constitutional right, viz: to raise, lower, fix and maintain their own prices, for their own property, in private sales thereof by themselves. The doing that is not prohibited or made criminal by the Act of Congress.

A criminal conspiracy is an agreement of two or more, either to do an act criminal or unlawful in itself, or to do a lawful act by means which are criminal or unlawful. *Pettibone v. United States*, 148 U. S. 203; *Commonwealth v. Shedd*, 7 Cush. 514. Here neither the act nor the means alleged are criminal or unlawful. The allegation of intent is immaterial. *Stevenson v. Newham*, 13 C. B. 285; *Allen v. Flood*, App. Cas. 1.

[383] Again, this point is settled by the ruling in the *Knight Case*, 156 U. S. 1, 16, that the restraint of trade, if any, which a combination by defendants to raise or lower their own prices would tend to effect would be an indirect result, and such result would not necessarily determine the object of the contract, combination or conspiracy.

As to the ninth paragraph we contend: The allegation is of a conclusion of law. The cartage as there described is not, under the allegations of the bill, interstate commerce. *State v. Knight*, 192 U. S. 1, 21; *Detroit &c. Ry. v. Interstate Comm. Com.*, 74 Fed. Rep. 803, 808; *Hopkins v. United States*, 171 U. S. 578, 592. The charge is not of a conspiracy either to do a criminal or unlawful act, or to do by unlawful means the lawful act of fixing their own charges for cartage. Nothing here charged has the direct, immediate or necessary effect to restrain interstate commerce.

As to the tenth paragraph we maintain: The allegation is of a legal conclusion. It also is too indefinite and general. Sufficient facts are not alleged. *United States v. Hanley*, 71 Fed. Rep. 672.

A contract or combination among manufacturers or producers of an article which is intended to become the subject of interstate commerce, to raise, lower and fix prices of such article, is not necessarily a contract, combination or conspiracy in restraint of interstate trade or an attempt to monop-

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olize that trade under the Sherman Act. *United States v. Nelson*, 52 Fed. Rep. 646; *In re Greene*, 52 Fed. Rep. 104; *United States v. E. C. Knight Co.*, 156 U. S. 1, 16; *Gibbs v. McNeeley*, 102 Fed. Rep. 504. See also *Distillery Co. v. People*, 156 Illinois, 468; *Glucose Company v. Harding*, 182 Illinois, 551.

There was no jurisdiction herein of this charge. No common contract, combination or conspiracy of the defendants with each other is alleged. The allegation that "all and each" have made agreements for less than lawful transportation rates is that they did so acting separately. That was not unlawful on [384] the part of the defendants; much less was it any violation of the Sherman Anti Trust Act. There is here no sufficient showing of an attempt to monopolize either the interstate transportation of live stock or fresh meats or interstate trade in live stock or fresh meats. The paragraph is multifarious, and there is therein a misjoinder of causes and parties.

As to the eleventh paragraph we submit that it is too general and insufficient to require argument. It is disposed of by what has been urged as to previous paragraphs.

Prior rulings by this court in cases arising under the Sherman Act do not sustain the Government's case here.

With respect to the supposed limitations of the Sherman Act upon the right of private contract, that act is to be interpreted in the light of the principles of the common law. *United States v. Wong Kim Ark*, 169 U. S. 649; *Moore v. United States*, 91 U. S. 270, 274; *Minor v. Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyd v. United States*, 116 U. S. 616, 624; *Smith v. Alabama*, 124 U. S. 465.

The bill of complaint is multifarious; and there is therein a misjoinder of causes and of parties. *Walker v. Powers*, 104 U. S. 251; *Brown v. Guarantee Trust Company*, 128 U. S. 403; *Zeigler v. Lake Street Railway*, 76 Fed. Rep. 662.

The bill is too general and indefinite to require answer. It does not sufficiently set forth definite or specific facts.

The demurrers to so much of the bill as prays for answer under oath, and to so much thereof as prays discovery of defendants' books, papers, etc., are well taken.

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Rights protected by the Fourth and Fifth Amendments are thereby infringed. *United States v. Saline Bank*, 1 Pet. 100; *Boyd v. United States*, 116 U. S. 616; *Counselman v. Hitchcock*, 142 U. S. 547; *Livingston v. Tompkins*, 4 Johns. Ch. 415, 432; *Entick v. Carrington*, 19 Howell's St. Tr. 1029; *S. C.*, 2 Wils. 275; *Huckle v. Money*, 2 Wils. 206; *Mitford & Tyler's Eq. Pldg.* 289.

Mr. Attorney General Moody, with whom Mr. William A. [385] Day, Assistant to the Attorney General, was on the brief, for the United States:

The facts show a combination which restrains or monopolizes trade or commerce and operates upon and directly affects interstate or foreign trade or commerce.

The combination or conspiracy which the Government is seeking to destroy and which it was the aim of the petition in this case to set forth is one between all the principal American producers or packers of fresh meats for the purpose of jointly controlling the market for those products throughout the entire United States so as to maintain uniform prices therefor and destroy competition in the sale thereof to dealers and consumers.

The combination set forth in the bill is in restraint of trade, for if in the entire field of the law concerning monopolies and restraints of trade there is a single proposition to which all courts now yield assent, it is that a combination, conspiracy, or agreement between independent manufacturers or producers of a necessary of life to fix and maintain uniform prices for their products, or otherwise to suppress competition with each other, is an unlawful restraint upon trade. *United States v. E. C. Knight Co.*, 156 U. S. 1, 16; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *United States v. Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Northern Securities Co. v. United States*, 193 U. S. 197; *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. Rep. 610; judgments of Lord Bramwell and Lord Han-
nen in *Mogul S. S. Co. v. McGregor*, L. R. App. Cas. (1892) 46, 58; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 155, 173; *Nester et al. v. Continental Brewing Co.*, 161 Pa. St. 473; *Salt Co. v. Guthrie*, 35 Ohio St. 166; *People v.*

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Sheldon, 139 N. Y. 251; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 405; *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507; *Craft v. McConoughby*, 79 Illinois, 346; *Noyes on Inter corporate Relations*, p. 513, note 1, and see the cases collected; and necessarily the means agreed upon to effect the unlawful object of the com- [386] bination of conspiracy are inseparable parts of the combination or conspiracy itself, and along with it fall within the condemnation of the law.

The combination or conspiracy in controversy operates upon interstate or foreign commerce, and its operations are not confined to commerce carried on wholly within state lines.

The sales of live stock to the defendants and the sales by them of the prepared meats are interstate and not intrastate transactions.

As to what is interstate commerce, see *Gibbons v. Ogden*, 9 Wheat. 1, 194; *Northern Securities Co. v. United States*, 193 U. S. 197, 337. If interstate commerce is commerce which concerns more States than one, and if a combination of independent producers to suppress competition between its members is a restraint upon commerce, it must follow that a combination of independent producers to fix and control prices and suppress competition between each other in an area covering more States than one is in restraint of interstate commerce and the petition in this case discloses such a combination.

It is impossible to say with even a color of reason that the facts stated in the bill, which cannot be denied, do not show a combination between the defendants to suppress competition between themselves in an area embracing more States than one and it is immaterial to inquire whether the particular purchases and sales made by the defendants are, technically, interstate or intrastate transactions. There is nothing unreasonable or novel in the conclusion that a combination may restrain interstate commerce, although the individual transactions of its members might, standing alone and viewed separate and apart from the purpose and necessary effect of the whole combination, be intrastate in character. *Montague & Co. v. Lowry*, 193 U. S. 38. The char-

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acter of a combination—that is, whether or not it is interstate in its operation—is decided, not by the nature of the particular transactions of its individual members, but by the extent of the territory in which it operates—in which it controls prices and sales and [387] suppresses competition. If that territory embraces more States than one the combination restrains interstate commerce. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 240.

Whether a combination in restraint of trade operates upon interstate or only intrastate commerce does not depend upon whether the individual transactions of its members, standing alone and viewed separate and apart from the purpose and necessary effect of the whole combination, are interstate or intrastate in character, and the petition here discloses a combination which operates upon *interstate* commerce; for whatever may be the character of the individual transactions of its several members, it is also true in this case that the individual transactions of the members of the combination do fall within the jurisdiction conferred upon Congress by the commerce clause of the Constitution. These transactions consist of the defendants' purchases of live stock; the sales and shipments of fresh meats made directly by the defendants to dealers and consumers in the several States, and the sales of fresh meats to dealers and consumers in the several States by agents of the defendants located in those States.

From all over the stock-raising section, embracing many different States, cattle, sheep and hogs are habitually shipped to the great live-stock markets at Chicago, Omaha, Sioux City, St. Joseph, Kansas City, East St. Louis and St. Paul for sale, to those, the defendants chief among them, engaged in the business of converting live stock into fresh meats for human consumption. The shipments are made with the express and sole purpose of sale as soon as market conditions will permit, and the sales are made while the cattle yet remain in first hands, that is, in the hands of the owners or their agents, and in the ordinary form or condition in which cattle are shipped from one country or State to another, which is analogous to the form or condition of the original package in the case of merchandise. *Austin v. Tennessee*, 179 U. S. 343, 359.

[388] The cattle are not dealt with in a commercial way

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from the time of their arrival until their sale to the defendants and others, but are simply fed and cared for. No act is done with reference to them that would cause them to become mixed with the general mass of local property. Now, it may be that a distinction should be made between what may be called an interstate sale proper and in the full sense of the term—that is, a sale between persons negotiating and dealing from two or more different States, and a sale, at its destination and while it still remains in the original state or package, of an article of commerce sent from another State. But so far as the result in this instance is concerned it is a distinction without a difference. If the sales of live stock set forth in the petition do not fall within the first of these classes they certainly fall within the second, and that brings them within the protection of the Federal power over commerce and therefore within the protection of the Anti Trust Act; for the right to transport articles of commerce from one State to another includes the right of the owner or consignee to sell them in the latter free from any burden or restraint that the States might attempt to impose. *Brown v. Maryland*, 12 Wheat. 419; *Bowman v. Chicago and Northwestern Railway Co.*, 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100; *Rhodes v. Iowa*, 170 U. S. 412, and, *a fortiori*, free from any burden or restraint that a combination of individuals might attempt to impose. *In re Debs*, 158 U. S. 564, 581; *Hopkins v. United States*, 171 U. S. 578, 590.

Paragraph 2 of the bill contains matter of description and inducement, and must be read in conjunction with the stating part of the petition, which alleges, *inter alia*, that “in order to restrain and destroy competition among themselves” the defendants have engaged in a “combination and conspiracy to arbitrarily from time to time raise, lower, and fix prices, and to maintain uniform prices at which they will sell, directly or through their respective agents, such fresh meats to dealers and consumers throughout the said States and Territories and the District of Columbia and foreign countries.”

[389] As the sales made directly by the defendants to dealers and consumers throughout the United States are interstate sales, and as decisions of this court have settled that a combination to control and suppress competition in such sales is a combination in restraint of interstate commerce,

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the petition in this case, having shown that much, cannot in any event be dismissed, even should it be held to have failed in all other respects.

Paragraph 3 of the petition states that the defendants are engaged in shipping fresh meats from their plants in certain States to their respective agents at and near the principal markets in other States and Territories for sale by such agents to dealers and consumers in those States and Territories. Upon the question whether or not the sales made by these agents under the circumstances set forth are within the body of interstate commerce, there is nothing to add to the cogent argument in the opinion of the circuit judge.

The bill is not multifarious and does not disclose a misjoinder of parties. 14 Ency. of Pl. and Pr. 198; 1 Bates Fed. Eq. Pro. §§ 135, 195. The Circuit Court did not err in sustaining the demurrers to the bill in its aspect as a bill of discovery. The demurrers are demurrers to the whole bill. *Livingstone v. Story*, 9 Pet. 632, 654.

The well-settled rule of equity pleading is that a demurrer to a whole bill cannot be sustained as to part of the bill and overruled as to part, but must be overruled as to the whole if any part of the bill is good and entitles the complainant to any relief. Fletcher, Eq. Pl. §§ 203, 204; Story, Eq. Pl., 10th ed., §§ 443, 444; *Parker v. Simpson*, 62 N. E. Rep. (Mass.) 401; *Metler's Admn's. v. Metler*, 18 N. J. Eq. 270, 273. When the defendants leveled their demurrers at the relief as well as the discovery, instead of answering as to the relief and demurring as to the discovery they did so at their peril. Daniell's Chan. Prac., 3d Am. ed., 568-608; see also Acts of Congress of February 25, 1903, 32 Stat. 903; of February 11, 1893, 27 Stat. 443, and *Interstate Comm. Com. v. Baird*, 194 U. S. 25, 44, [390] citing *Brown v. Walker*, 161 U. S. 591; *Boyd v. United States*, 116 U. S. 616.

Judges have differed as to the validity of aggregations of capital effected by some form of organic union between several smaller and competing corporations, and economists are far from agreeing that such aggregations, within limitations, are hurtful. So too, associations of manufacturers to regulate competition within a restricted area have not always been condemned by courts and have sometimes been ap-

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proved by publicists. But as yet no responsible voice has been heard to justify, legally or economically, a conspiracy or agreement between nearly all the producers of a commodity necessary to life by which the confederates acquire absolute control and dominion over the production, sale and distribution of that commodity throughout the entire territory of a nation, with the power, at will, to raise prices to the consumer of the finished product and lower prices to the producer of the raw material. Yet such is that now at the bar of this court. That there is a conspiracy to control the market of the nation for fresh meats, that it does control it, and that its control is merciless and oppressive, are facts known of all men. The broad question here is, Does the Government's petition, with its statements of fact standing unchallenged, discover that conspiracy to the court? We submit that it does and that the decree of the Circuit Court should in all things be affirmed.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court, on demurrer, granting an injunction against the appellants' commission of alleged violations of the act of July 2, 1890, c. 647, 26 Stat. 209, "to protect trade and commerce against unlawful restraints and monopolies." It will be necessary to consider both the bill and the decree. The bill is brought against a number of corporations, firms and individuals of different States and makes the following allegations: 1. The defend- [391] ants (appellants) are engaged in the business of buying live stock at the stock yards in Chicago, Omaha, St. Joseph, Kansas City, East St. Louis and St. Paul, and slaughtering such live stock at their respective plants in places named, in different States, and converting the live stock into fresh meat for human consumption. 2. The defendants "are also engaged in the business of selling such fresh meats, at the several places where they are so prepared, to dealers and consumers in divers States and Territories of the said United States other than those wherein the said meats are so prepared and sold as aforesaid, and in the District of Columbia, and in foreign countries, and shipping the

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same meats, when so sold from the said places of their preparation, over the several lines of transportation of the several railroad companies serving the same as common carriers, to such dealers and consumers, pursuant to such sales." 3. The defendants also are engaged in the business of shipping such fresh meats to their respective agents at the principal markets in other States, etc., for sale by those agents in those markets to dealers and consumers. 4. The defendants together control about six-tenths of the whole trade and commerce in fresh meats among the States, Territories and District of Columbia, and, 5, but for the acts charged would be in free competition with one another.

6. In order to restrain competition among themselves as to the purchase of live stock, defendants have engaged in, and intend to continue, a combination for requiring and do and will require their respective purchasing agents at the stock yards mentioned, where defendants buy their live stock (the same being stock produced and owned principally in other States and shipped to the yards for sale), to refrain from bidding against each other, "except perfunctorily and without good faith," and by this means compelling the owners of such stock to sell at less prices than they would receive if the bidding really was competitive.

7. For the same purposes the defendants combine to bid up, through their agents, the prices of live stock for a few days at [392] a time, "so that the market reports will show prices much higher than the state of the trade will warrant," thereby inducing stock owners in other States to make large shipments to the stock yards to their disadvantage.

8. For the same purposes, and to monopolize the commerce protected by the statute, the defendants combine "to arbitrarily, from time to time raise, lower, and fix prices, and to maintain uniform prices at which they will sell" to dealers throughout the States. This is effected by secret periodical meetings, where are fixed prices to be enforced until changed at a subsequent meeting. The prices are maintained directly, and by collusively restricting the meat shipped by the defendants, whenever conducive to the result, by imposing penalties for deviations, by establishing a uniform rule for the giving of credit to dealers, etc., and by notifying one another

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of the delinquencies of such dealers and keeping a black list of delinquents, and refusing to sell meats to them.

9. The defendants also combine to make uniform charges for cartage for the delivery of meats sold to dealers and consumers in the markets throughout the States, etc., shipped to them by the defendants through the defendants' agents at the markets, when no charges would have been made but for the combination.

10. Intending to monopolize the said commerce and to prevent competition therein, the defendants "have all and each engaged in and will continue" arrangements with the railroads whereby the defendants received, by means of rebates and other devices, rates less than the lawful rates for transportation, and were exclusively to enjoy and share this unlawful advantage to the exclusion of competition and the public. By force of the consequent inability of competitors to engage or continue in such commerce, the defendants are attempting to monopolize, have monopolized, and will monopolize the commerce in live stock and fresh meats among the States and Territories, and with foreign countries, and, 11, the defendants are and have been in conspiracy with each other, with [393] the railroad companies and others unknown, to obtain a monopoly of the supply and distribution of fresh meats throughout the United States, etc. And to that end defendants artificially restrain the commerce and put arbitrary regulations in force affecting the same from the shipment of the live stock from the plains to the final distribution of the meats to the consumers. There is a prayer for an injunction of the most comprehensive sort, against all the foregoing proceedings and others, for discovery of books and papers relating directly or indirectly to the purchase or shipment of live stock, and the sale or shipment of fresh meat, and for an answer under oath. The injunction issued is appended in a note.^a

^a "And now, upon motion of the said attorney, the court doth order that the preliminary injunction heretofore awarded in this cause, to restrain the said defendants and each of them, their respective agents and attorneys, and all other persons acting in their behalf, or in behalf of either of them, or claiming so to act, from entering into, taking part in, or performing any contract, combination or conspiracy, the purpose

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[394] To sum up the bill more shortly, it charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different States, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers and to keep a black list, to make uniform and improper charges for cartage, and finally, to get less than lawful rates from the railroads to the exclusion of competitors. It is true that the last charge is not clearly stated to be a part of the combination. But as it is alleged that the defendants have each and all made arrangements with the railroads, that they were exclusively to enjoy the unlawful advantage, and that their intent in what they did was to monopolize the commerce and to prevent competition, and in view of the general allegation to

or effect of which will be, as to trade and commerce in fresh meats between the several States and Territories and the District of Columbia, a restraint of trade, in violation of the provisions of the act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock; or collusively and by agreement to refrain from bidding against each other at the sales of live stock; or by combination, conspiracy or contract raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents; or by curtailing the quantity of such meats shipped to such markets and agents; or by establishing and maintaining rules for the giving of credit to dealers in such meats, the effect of which rules will be to restrict competition; or by imposing uniform charges for cartage and delivery of such meats to dealers and consumers, the effect of which will be to restrict competition; or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid; and also from violating the provisions of the act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' by combining or conspiring together, or with each other and others, to monopolize or attempt to monopolize any part of the trade and commerce in fresh meats among the several States and Territories and the District of Columbia, by demanding, obtaining, or, with or without the connivance of the officers or agents thereof, or of any of them, receiving from railroad companies or other

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which we [395] shall refer, we think that we have stated correctly the purport of the bill. It will be noticed further that the intent to monopolize is alleged for the first time in the eighth section of the bill as to raising, lowering and fixing prices. In the earlier sections, the intent alleged is to restrain competition among themselves. But after all the specific charges there is a general allegation that the defendants are conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meats throughout the United States, etc., as has been stated above, and it seems to us that this general allegation of intent colors and applies to all the specific charges of the bill. Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use

common carriers transporting such fresh meats in such trade and commerce, either directly or by means of rebates, or by any other device, transportation of or for such means, from the points of the preparation and production of the same from live stock or elsewhere, to the markets for the sale of the same to dealers and consumers in other States and Territories than those wherein the same are so prepared, or the District of Columbia, at less than the regular rates which may be established or in force on their several lines of transportation, under the provisions in that behalf of the laws of the said United States for the regulation of commerce, be and the same is hereby made perpetual.

"But nothing herein shall be construed to prohibit the said defendants from agreeing upon charges for cartage and delivery, and other incidents connected with local sales, where such charges are not calculated to have any effect upon competition in the sales and delivery of meats; nor from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers, nor from curtailing the quantity of meats shipped to a given market where the purpose of such arrangement in good faith is to prevent the over-accumulation of meats as perishable articles in such markets.

"Nor shall anything herein contained be construed to restrain or interfere with the action of any single company or firm, by its or their officers or agents (whether such officers or agents are themselves personally made parties defendant hereto or not) acting with respect to its or their own corporate or firm business, property or affairs."

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of English speech. Thus read this bill seems to us intended to allege successive elements of a single connected scheme.

We read the demurrer with the same liberality. Therefore we take it as applying to the bill generally for multifariousness and want of equity, and also to each section of it which makes a charge and to the discovery. The demurrer to the discovery will not need discussion in the view which we take concerning the relief, and therefore we turn at once to that.

The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from their nature must be so extensive in time [396] and space, that something of the same impossibility applies to them. The law has been unheld, and therefore we are bound to enforce it notwithstanding these difficulties. On the other hand, we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can.

The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens v. Wisconsin*, 195 U. S. 194, 206. The statute gives this proceeding against combinations in

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restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee*, 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result. What we have said disposes incidentally of the objection to the bill as multifarious. The unity of the plan embraces all the parts.

One further observation should be made. Although the [397] combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single State is an object of attack. See *Leloup v. Port of Mobile*, 127 U. S. 640, 647; *Crutcher v. Kentucky*, 141 U. S. 47, 59; *Allen v. Pullman Co.*, 191 U. S. 171, 179, 180. Moreover, it is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States v. E. C. Knight Co.*, 156 U. S. 1, where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a State. However likely monopoly of commerce among the States in the article manufactured was to follow from the agreement it was not a necessary consequence nor a primary end. Here the subject matter is sales and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales. The two cases are near to each other, as sooner or later always must happen where lines are to be drawn, but the line between them is distinct. *Montague & Co. v. Lowry*, 193 U. S. 38.

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So, again, the line is distinct between this case and *Hopkins v. United States*, 171 U. S. 578. All that was decided there was that the local business of commission merchants was not commerce among the States, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect and not within the act. Whether the case would have been different if the combination had resulted in exorbitant charges, was left open. In *Anderson v. United States*, 171 U. S. 604, the defendants were buyers and sellers at the stock yards, but their agreement was merely not to employ brokers, or to [398] recognize yard-traders, who were not members of their association. Any yard-trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the States, and, being formed with a different intent, was not within the act. The present case is more like *Montague & Co. v. Lowry*, 193 U. S. 38.

For the foregoing reasons we are of opinion that the carrying out of the scheme alleged, by the means set forth, properly may be enjoined, and that the bill cannot be dismissed.

So far it has not been necessary to consider whether the facts charged in any single paragraph constitute commerce among the States or show an interference with it. There can be no doubt, we apprehend, as to the collective effect of all the facts, if true, and if the defendants entertain the intent alleged. We pass now to the particulars, and will consider the corresponding parts of the injunction at the same time. The first question arises on the sixth section. That charges a combination of independent dealers to restrict the competition of their agents when purchasing stock for them in the stock yards. The purchasers and their slaughtering establishments are largely in different States from those of the stock yards, and the sellers of the cattle, perhaps it is not too much to assume, largely in different States from either. The

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intent of the combination is not merely to restrict competition among the parties, but, as we have said, by force of the general allegation at the end of the bill, to aid in an attempt to monopolize commerce among the States.

It is said that this charge is too vague and that it does not set forth a case of commerce among the States. Taking up the latter objection first, commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect [399] they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated. See *Norfolk & Western Ry. v. Sims*, 191 U. S. 441. But the sixth section of the bill charges an interference with such sales, a restraint of the parties by mutual contract and a combination not to compete in order to monopolize. It is immaterial if the section also embraces domestic transactions.

It should be added that the cattle in the stock yard are not at rest even to the extent that was held sufficient to warrant taxation in *American Steel & Wire Co. v. Speed*, 192 U. S. 500. But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the States, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it. The injunction against taking part in a combination, the effect of which will be a restraint of trade among the States by directing the defendants' agents to refrain from bidding against one another at the sales of live stock, is justified so far as the subject matter is concerned.

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The injunction, however, refers not to trade among the States in cattle, concerning which there can be no question of original packages, but to trade in fresh meats, as the trade forbidden to be restrained, and it is objected that the trade in fresh meats described in the second and third sections of the bill is not commerce among the States, because the meat is sold at the slaughtering places, or when sold elsewhere may be sold in less than the original packages. But the allegations of the second section, even if they import a technical passing [400] of title at the slaughtering places, also import that the sales are to persons in other States, and that the shipments to other States are part of the transaction—"pursuant to such sales"—and the third section imports that the same things which are sent to agents are sold by them, and sufficiently indicates that some at least of the sales are of the original packages. Moreover, the sales are by persons in one State to persons in another. But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States. Nor do we mean to intimate that the statute under consideration is limited to that point. Beyond what we have said above, we leave those questions as we find them. They were touched upon in the *Northern Securities Company's Case*, 193 U. S. 197.

We are of opinion, further, that the charge in the sixth section is not too vague. The charge is not of a single agreement but of a course of conduct intended to be continued. Under the act it is the duty of the court, when applied to, to stop the conduct. The thing done and intended to be done is perfectly definite: with the purpose mentioned, directing the defendants' agents and inducing each other to refrain from competition in bids. The defendants cannot be ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete. See *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211. The injunction follows the charge. No objection was made on the ground that it is not confined to the places specified in the

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bill. It seems to us, however, that it ought to set forth more exactly the transactions in which such directions and agreements are forbidden. The trade in fresh meat referred to should be defined somewhat as it is in the bill, and the sales of stock should be confined to sales of stock at the stock yards named, which stock is sent from other States to the stock yards for sale or is bought at those yards for transport to another State.

[401] After what we have said, the seventh, eighth and ninth sections need no special remark, except that the cartage referred to in section nine is not an independent matter, such as was dealt in *Pennsylvania Railroad v. Knight*, 192 U. S. 21, but a part of the contemplated transit—cartage for delivery of the goods. The general words of the injunction “or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid,” should be stricken out. The defendants ought to be informed as accurately as the case permits what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning that it was our duty to avoid. To the same end of definiteness so far as attainable, the words “as charged in the bill,” should be inserted between “dealers in such meats,” and “the effect of which rules,” and two lines lower, as to charges for cartage, the same words should be inserted between “dealers and consumers” and “the effect of which.”

The acts charged in the tenth section, apart from the combination and the intent, may, perhaps, not necessarily be unlawful, except for the adjective which proclaims them so. At least we may assume, for purposes of decision, that they are not unlawful. The defendants, severally, lawfully may obtain less than the regular rates for transportation if the circumstances are not substantially similar to those for which the regular rates are fixed. Act of Feb. 4, 1887, c. 104, § 2, 24 Stat. 379. It may be that the regular rates are fixed for carriage in cars furnished by the railroad companies, and that the defendants furnish their own cars and other necessi-

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ties of transportation. We see nothing to hinder them from combining to that end. We agree, as we already have said, that such a combination may be unlawful as part of the general scheme set forth in the bill, and that this scheme as a whole might be enjoined. Whether this particular combination can be enjoined, as it is, apart from its connection with the other [402] elements, if entered into with the intent to monopolize, as alleged, is a more delicate question. The question is how it would stand if the tenth section were the whole bill. Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. *Commonwealth v. Peaslee*, 177 Massachusetts, 267, 272. The same distinction is recognized in cases like the present. *United States v. E. C. Knight Co.*, 156 U. S. 1, 13; *Kidd v. Pearson*, 128 U. S. 1, 23, 24. We are of opinion, however, that such a combination is within the meaning of the statute. It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation. And even if the advantage is one which the act of 1887 permits, which is denied, perhaps inadequately, by the adjective "unlawful," still a combination to use it for the purpose prohibited by the act of 1890 justifies the adjective and takes the permission away.

It only remains to add that the foregoing question does not apply to the earlier sections, which charge direct restraints of trade within the decisions of the court, and that the criticism of the decree, as if it ran generally against combinations in restraint of trade or to monopolize trade, ceases to have any force when the clause against "any other method or device" is stricken out. So modified it restrains such combinations only to the extent of certain specified devices, which the defendants are alleged to have used and intend to continue to use.

Decree modified and affirmed.

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[244] HARRIMAN v. NORTHERN SECURITIES COMPANY.^a

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 512. Argued March 1, 2, 1905.—Decided March 6, 1905.—Opinion delivered April 3, 1905.

[197 U. S., 244.]

After affirmance of the decree in the Northern Securities case, 193 U. S. 197, adjudging the combination illegal under the Anti-Trust Act, the corporation adopted a resolution reducing its capital stock and distributing the surplus of assets created by the reduction and consisting of shares of the Northern Pacific and Great Northern Railway Companies ratably among its stockholders. Complainants objected to the *pro rata* distribution and insisted that the Northern Pacific stock they had delivered to the Securities Company was not so delivered in pursuance of an absolute sale but to be held in trust; that they were entitled to have their stock returned to them; that the decree in the Government suit practically so adjudicated and that as they acted in good faith, believing that the original contract was not within the prohibitions of the Anti-Trust Act, the doctrine of *in pari delicto* did not apply.^b

The Circuit Court granted a temporary injunction against *pro rata* distribution and the Circuit Court of Appeals reversed the order and practically disposed of the entire case adversely to complainants. This court granted a writ of certiorari. *Held*, that:

Where the decree of the Circuit Court of Appeals in an action in equity only reverses an order of the Circuit Court granting an injunction, but the court, the record presenting the whole case, practically disposes of the entire controversy on the merits, certiorari may issue from this court and this court may finally dispose of it by its direction to the Circuit Court.

The decree of the Circuit Court in the Northern Securities case, affirmed by this court, 193 U. S. 197, did not determine the quality of the transfer as between the defendants, and the provisions therein as to return of shares of stock transferred to it by the railway stockholders were permissive only, and not an adjudication that any of the vendors were entitled to a restitution of their original railway shares.

^a Circuit Court awarded a preliminary injunction restraining the Northern Securities Company from disposing of certain shares of the common stock of the Northern Pacific Railway Company (132 Fed., 464). See p. 587. Reversed by the Circuit Court of Appeals, Third Circuit (134 Fed., 331). See p. 618. Decree of C. C. A. affirmed by the Supreme Court (197 U. S., 244).

^b Syllabus and abstracts of arguments and briefs copyrighted, 1905 by The Banks Law Publishing Co.

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The judgment of this court affirming the decree of the Circuit Court in the Northern Securities case went no further than the decree itself, and while it leaves the Circuit Court at liberty to proceed in the execution of its decree as circumstances may require, it does not operate to change the decree or import a power to do so not otherwise possessed.

General expressions in an opinion which are not essential to dispose of a case are not permitted to control the judgment in subsequent suits.

Nothing in the judgment or opinion of this court in the *Northern Securities* [245] case, 193 U. S. 197, enlarged the scope of the decree of the Circuit Court so as to make it an adjudication that any of the vendors of railway stocks were entitled to judicial restitution of the stocks transferred by them to the Securities Company, or that the Securities Company could not distribute the shares of railway stock held by it *pro rata* between its own shareholders.

The transaction between complainants and the Northern Securities Company was one of purchase and sale of Northern Pacific Railway Company stock for shares of stock of the Securities Company and cash and not a bailment or trust.

When a vendor testifies that the transaction was an unconditional sale and that he attached to his negotiations no other conditions than that of price, he is estopped from afterwards denying that this is a statement of fact and claiming that he only swore to a conclusion of law.

Property delivered under an executed illegal contract cannot be recovered back by any party *in pari delicto*, and the courts cannot relax the rigor of this rule where the record discloses no special considerations of equity, justice or public policy.

The fact that the complainants in this case acted in good faith and without intention to violate the law does not exempt them from the doctrine of *in pari delicto*. All the parties having supposed the statute would not be held applicable to the transaction neither can plead ignorance of the law as against the other and the defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed.

Where a vendor after transferring shares of railway stock to a corporation in exchange for its shares becomes a director of the purchasing corporation and participates in acts consistent only with absolute ownership by it of the railway stocks, and does so after an action has been brought to declare the transaction illegal, his right to rescind the contract and compel restitution of his original railway shares, if it ever existed, is lost by acquiescence and laches.

The Northern Pacific system taken in connection with the Burlington system is competitive with the Union Pacific system, and, the entire record considered, to deliver to the complainants, the Northern Pacific stock claimed by them and distribute the balance of the stock ratably between the other Securities Company stockholders, would

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not only be inequitable but would tend to smother competition and thus contravene the object of the Sherman law and the purposes of the suit brought by the Government against the Northern Securities Company.

It was the duty of the Securities Company under the decree in the Government suit to end a situation which had been adjudged unlawful, and as this could be effected by sale and distribution in cash, or by distribution in kind, the company was justified in adopting the latter method and avoiding the forced sale of several hundred million dollars of stock which would have involved disastrous results.

EDWARD H. HARRIMAN, Winslow S. Pierce, Oregon Short [246] Line Railroad Company and The Equitable Trust Company of New York exhibited their bill against the Northern Securities Company in the Circuit Court of the United States for the District of New Jersey, April 20, 1904, on which, with accompanying affidavits and exhibits, a restraining order was issued, pending an application for an injunction as prayed in the bill. April 26 an amended bill was filed, and the application for a preliminary injunction was heard May 20, 21 and 23 by Bradford, J., holding the Circuit Court.

On the fourth day of June a second amended bill was filed, and on July 15, 1904, Judge Bradford delivered an opinion sustaining the application. 132 Fed. Rep. 464.

The order for injunction was entered August 18, 1904, and an appeal therefrom was prosecuted to the Circuit Court of Appeals for the Third Circuit, which, on January 3, 1905, reversed the order. 134 Fed. Rep. 331.

Thereupon complainants applied to this court for the writ of certiorari, which was granted January 30, and the matter advanced for hearing, and heard March 1 and 2. The affirmance of the decree of the Circuit Court of Appeals was announced March 6, it being added that an opinion would be filed afterwards.

The Northern Pacific Railway Company was the successor through reorganization of the Northern Pacific Railroad Company, and by its charter it was provided that its capital stock might be increased from time to time by a vote of a majority of the stockholders, and that the company might, by a like vote, classify its stock into common and preferred, and might "make such preferred stock convertible into com-

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mon stock upon such terms and conditions as may be fixed by the board of directors." On July 1, 1896, by the unanimous vote of its then stockholders, the capital stock was increased to one hundred and fifty-five million dollars, divided into eighty millions of common stock and seventy-five millions of preferred stock, and it was resolved "that such preferred stock shall be issued upon the condition that at its option the com- [247] pany may retire the same, in whole or in part, at par, from time to time, on any first day of January prior to 1917." The plan of reorganization which was adopted provided that as to the new company which it was contemplated should acquire the properties and franchises of the Northern Pacific Railroad Company, and the issue of preferred stock by it, "the right will be reserved by the new company to retire this stock, in whole or in part, at par, from time to time, upon any first day of January during the next twenty years."

All the certificates of stock, whether common or preferred, at that time or subsequently issued, contained this clause: "The company shall have the right at its option, and in such manner as it shall determine, to retire the preferred stock, in whole or in part, at par, from time to time, upon any first day of January prior to 1917."

The reorganization had been managed by J. P. Morgan & Co., and the directory of the Northern Pacific Railway Company were friendly to that firm. During the same period the president of the Great Northern Railway Company was James J. Hill, and its directors were friendly to him.

The two companies were friendly to each other, and in April, 1901, acquired the shares of the Chicago, Burlington and Quincy Railroad Company.

At this time the Union Pacific Railway system included the Union Pacific Railway, the railroad of the Oregon Short Line Railroad Company, and the railroad of the Oregon Railroad and Navigation Company. The Union Pacific Company was practically the owner of the entire capital stock of the Oregon Short Line Railroad Company, and the latter company was the owner of practically the entire capital stock of the Oregon Railway and Navigation Company. The interests in control of the Union Pacific system might

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properly be called the Harriman interests. Shortly thereafter, at the instance of the Union Pacific Railway Company and with money furnished by that company, the Oregon Short Line Company purchased Northern Pacific preferred stock to the amount of \$41,085,000, [248] and common stock to the amount of \$37,023,000, aggregating \$78,100,000 of stock, being a majority of the \$155,000,000, total capital stock of the Northern Pacific Company as then outstanding. But the preferred stock was subject to retirement at par at the option of the company, and the 370,230 shares of common stock was less than a majority of the total common stock, which majority was held by the Morgan-Hill party.

In October, 1901, complainant Harriman was elected a member of the board of directors of the Northern Pacific Railway Company and James Stillman was reelected. They were also directors of the Union Pacific Railway Company. They both attended a meeting of the Northern Pacific board on November 13, 1901, and Harriman was chosen a member of the executive committee. At this meeting resolutions were adopted providing for and resulting in the retirement of the preferred stock on January 1, 1902, by the payment of \$100 cash for each and every share to each and every holder of record on that day.

These resolutions declared that the company thereby determined to exercise its right to retire the preferred stock; provided that for the purpose of raising the funds necessary to do so, the company should issue its negotiable bonds for \$75,000,000, convertible at par into shares of the common stock of the company at par; authorized the making of a contract for the sale of all of such bonds at par and accrued interest, the contract to contain a provision giving to the holder of every share of the common stock the opportunity to receive from the contract purchaser, at par and interest, such bonds to an amount equal to seventy-five eightieths of the par amount of said common stock at such time owned by such holder, and arranged for the retirement from and after December 31, 1901, of the \$75,000,000 preferred stock, by the payment to each and every holder of record thereof on January 1, 1902, of \$100 cash for each and every share.

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On November 15, the executive committee of the Northern [249] Pacific Company authorized the execution of a contract with the Standard Trust Company of New York for the sale and delivery of the convertible certificates for \$75,000,000 provided for in the resolutions.

The preferred stock was subsequently taken up in accordance with the plan resolved upon.

The Northern Securities Company was incorporated under the laws of New Jersey in November, 1901, its articles of association having been filed at Trenton on the thirteenth day of that month, with a capital stock of \$400,000,000, divided into 4,000,000 shares of the par value of \$100 each, and its objects being certified to be:

"(1.) To acquire by purchase, subscription or otherwise, and to hold as investments any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey or of any other State, Territory or country.

"(2.) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and, while owner thereof, to exercise all the rights, powers and privileges of ownership.

"(3.) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and, while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

"(4.) To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation; and to do any acts or things designed to protect, preserve, improve or en- [250] hance the value of any such bonds or other securities or evidences of indebtedness or stock.

"(5.) To acquire, own and hold such real and personal property as may be necessary or convenient for the transaction of its business.

"The business or purpose of the corporation is from time to time to do any one or more of the acts and things herein set forth.

"The corporation shall have power to conduct its business in other States and in foreign countries, and to have one or more offices out of this State, and to hold, purchase, mortgage and convey real and personal property out of this State."

On the fourteenth day of November, 1901, fifteen gentlemen, including complainant Harriman and two other directors of the Union Pacific, James J. Hill, president of the Great Northern, and two members of J. P. Morgan & Co., were elected directors of the Northern Securities Company. Complainant Harriman took his seat at the board and an

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executive committee of five was elected, of which he was one.

November 15 resolutions were passed authorizing the purchase of the Northern Pacific stock held by Harriman and Pierce, as follows:

"The president stated that he now had an opportunity of acquiring \$37,023,000 par value of the common stock, and \$41,085,000 par value of the preferred stock, of the Northern Pacific Railway Company, at an aggregate price of \$91,407,500, payable, as to \$82,491,871, in the fully paid-up and non-assessable shares of this company at par, and, as to the remaining \$8,915,629, in cash.

"On motion, and by affirmative vote of all the directors present, it was—

"*Resolved*, That the president be, and hereby he is, authorized in behalf of this company, to purchase said stock—namely \$37,023,000 par value of the common stock, and \$41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of \$91,407,500, [251] payable as to \$82,491,871 thereof in the fully paid-up and non-assessable shares of the capital stock of this company at par, and as to \$8,915,629 in cash; and that the officers of this company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of stock of this company to the amount of \$82,491,871, and to pay \$8,915,629 in cash, in consideration of such \$37,023,000 of the common stock and \$41,085,000 of the preferred stock of the Northern Pacific Railway Company.

"*Resolved*, That the president be, and hereby he is, authorized at any time to retire at par, for cash, any and all preferred stock of the Northern Pacific Railway Company that may be acquired by this company, and in case such retirement shall be effected prior to January 1, 1902, to allow interest up to January 1, 1902, at the rate of four per cent per annum, on the sum receivable for such preferred stock.

"*Resolved*, That the president be, and hereby he is, authorized in behalf of this company to purchase at their par value an amount of the convertible certificates of the Northern Pacific Railway Company, to be issued pursuant to the resolutions of the board of directors of the Northern Pacific Railway Company, passed November 13, 1901, equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this company.

"*Resolved*, That the president be, and hereby he is, authorized, in case of the purchase by this company of any of the convertible certificates of the Northern Pacific Railway Company, to convert the same into common stock of the Northern Pacific Railway Company whenever such conversion may be effected.

"*Resolved*, That the president be, and hereby he is, authorized to borrow, on such terms as he may arrange, any moneys required for the purpose of carrying out the foregoing resolutions, and to make all financial arrangements, [252] and to do all acts and things, which he may deem needful in the premises."

Complainant Harriman and his co-directors of the Union Pacific were not present at this meeting, but were present at the next meeting of the board on November 19, at which the minutes of the meeting of November 15 were read and on motion were approved.

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At a subsequent meeting of the executive committee, in which Mr. Harriman participated, the form of the company's permanent stock certificate, being the usual form, was unanimously approved.

In the meantime, and on November 18, Harriman and Pierce had delivered their Northern Pacific stock to the Northern Securities Company and that company had delivered to them the 824,000 shares of its stock and \$8,915,629 in cash.

The Northern Pacific stock certificates received from Harriman and Pierce were surrendered by the Securities Company to the Northern Pacific Railway Company. The certificates for the 370,230 shares of common stock were exchanged for 370,230 shares of common stock issued in the name of the Northern Securities Company. The certificates for the 410,580 shares of preferred stock were surrendered to the Northern Pacific Railway Company for retirement, and paid for and retired as provided, the transaction resulting in the receipt by the Northern Securities Company of certificates for 347,090 shares of new common stock. This made 717,320 shares, and the Securities Company also acquired 820,270 shares, from a large number of separate individual owners. And from a large number of stockholders of the Great Northern 1,181,242 shares of the stock of the latter company.

At a meeting of the board of directors of the Northern Securities Company on January 22, 1903, at which complainant Harriman was present, the sale by the company of 75,000 shares of its own stock for cash was approved. The second amended bill says \$7,522,000 "was issued for cash used for the purchase of other property and for corporate purposes."

[253] From the organization of the Securities Company until the affirmance of the decree in the Government suit, hereafter mentioned, complainants continued to exercise the right of holders of 824,000 shares of stock in the Securities Company; received their share of dividends, and gave their proxy to vote at the annual meetings of 1902 and 1903.

July 17, 1902, Harriman and Pierce and the Oregon Short Line Company pledged the 824,000 shares of Northern Securities Company stock to the Equitable Trust Company,

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the Short Line Company executing a trust indenture, which contained this clause:

"The deposit and pledge hereunder of said shares of stock, or of any other securities which shall become subject to this indenture, shall not prevent the consolidation, union or merger with any other corporation of the Securities Company, or of any other corporation by which said securities shall have been issued, or the sale of its property or the distribution of its assets. In any such case the trustees shall receive such amounts of stock, bonds or other securities, or money, or of either or all of them, as the holders of the pledged shares of stock of the Securities Company or other pledged securities, as the case may be, shall be entitled to receive and upon receipt thereof shall surrender the deposited stock certificates or other securities."

March 10, 1902, a bill was exhibited in the Circuit Court of the United States for the District of Minnesota by the United States against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, to restrain the violation of the act of Congress of July 2, 1890, 26 Stat. 209, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," which resulted April 9, 1903, in a decision in favor of complainants, 120 Fed. Rep. 721, and a decree as follows:

"That the defendants above named have heretofore entered [254] into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants, and employes, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election

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for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company, or [255] any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies.

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which the said Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

The case was brought to this court, and March 14, 1904, the decree was affirmed. 193 U. S. 197.

March 22, 1904, the board of directors of the Northern Securities Company adopted the following preamble and resolutions:

"Whereas, In the course of its business, this company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

"Whereas, In a suit brought by the United States against this company, the said railway companies and others, this company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company; and

"Whereas, This company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

[256] "Whereas, This company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay:

"Resolved, In consideration of the premises, it is declared necessary and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railway companies held by it.

"Resolved, That the board of directors of this company hereby declares it advisable that article (Fourth) of this company's certificate of incorporation be amended, so as to read as follows:

"Fourth. The capital stock of this company is hereby reduced to three million nine hundred and fifty-four thousand dollars (\$3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars (\$3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars (\$100) each. Such reduction of capital stock shall be accomplished by each holder of

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outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine (99) per centum of the shares held by him.

"Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents (\$39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents (\$30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company.

"The board of directors or executive committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof and all matters pertaining to the surrender and retirement [257] of the stock of this company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the board. For the purposes hereof, the stockholders of this company, and the number of shares held by them, respectively, shall be determined from the stock transfer books of the company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the board.

"*Resolved*, That a meeting of the stockholders of this company, for the purpose of taking action upon the said alteration of the certificate of incorporation of this company and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this company in the city of Hoboken, county of Hudson, and State of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904."

Notice was accordingly given that the meeting of the stockholders would be held on April 21, and a copy of the resolutions and an explanatory letter were sent to the Attorney General of the United States. Early in April the three principal complainants in the present suit presented to the Circuit Court for the District of Minnesota their petition for leave to intervene in the suit of the United States against the Northern Securities Company, setting up substantially the same grounds as in this suit, and seeking similar relief. This application was heard at St. Paul, April 12 and 13. The Government appeared by the Attorney General, and filed a declaration that it was satisfied with the relief granted. April 19, 1904, the court rendered its decision, denying leave to intervene. 128 Fed. Rep. 808.

Up to April 18, 1904, the Securities Company had issued 86,945 certificates of stock and there had been 16,000 transfers registered on the books of the company. At the closing of the transfer books on that day there were 3,953,971 shares of stock outstanding in the hands of 2,531 separate holders.

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[258] The meeting of the stockholders of the Northern Securities Company was duly held April 21, 1904; and at that meeting the stock of the company was reduced ninety-nine per centum, and the proposed pro rata distribution of the stock of the Northern Pacific Railway Company and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Northern Securities Company, was assented to. Two million nine hundred and forty-four thousand seven hundred and forty shares were represented and all voted for the plan adopted by the directors.

As has been stated, the second amended bill was filed after the hearing on the application for the preliminary injunction, and it was therein alleged, among other things, that the Northern Securities Company was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several States; that the said company was to "acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of said holding company upon the basis of \$180 par value of its stock for each share of Great Northern stock and \$115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns."

"That prior to the incorporation of said Northern Securities Company your orator Oregon Short Line Railroad Company, had acquired and at the time of the incorporation and organization of said Securities Company owned \$37,023,000 par value of the common stock and \$41,085,000 par value of the preferred stock of the defendant Northern Pacific Railway Company represented by certificates issued to and registered in the name of your orators Harriman and Pierce; and that after [259] the incorporation of the said Northern Securities Company had been resolved upon as

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aforesaid, your orators Harriman, Pierce and Oregon Short Line Railroad Company agreed with the promoters and incorporators of said Northern Securities Company to transfer to and deposit with said Northern Securities Company, under the terms and conditions aforesaid, the said shares of said Northern Pacific Railway Company of the aggregate par value of \$78,108,000 owned by said Oregon Short Line Railroad Company as aforesaid, and to receive in exchange therefor certificates of said Northern Securities Company representing an interest therein of \$82,491,871 par value and \$8,915,629 in cash, and in pursuance of said agreement your orators Harriman and Pierce, acting for your orator Oregon Short Line Railroad Company did, on or about the eighteenth day of November, 1901, transfer and deliver to said Northern Securities Company certificates for \$37,023,000 par value of the common stock and \$41,085,000 par value of the preferred stock of said Northern Pacific Railway Company owned by your said orator as aforesaid and received in exchange therefor certificates of said Northern Securities Company representing an interest in \$82,491,871 par value and said cash. * * *

“That at the time of such exchange, on said eighteenth of November, 1901, it was agreed between said Harriman and Pierce and said defendant Northern Securities Company that the said \$41,085,000 par value of said preferred stock of the said Northern Pacific Railway Company should be converted into common stock of said Northern Pacific Railway Company; that said preferred stock was subsequently and in or about the month of December, 1901, converted by said defendant Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value; that certificates for \$34,709,062 par value of such common stock registered in its name on the books of said railway company were substituted in lieu and place of the certificates for said preferred stock; that said Northern Securities Company [260] caused said original common stock to be transferred into its name upon the books of said railway company, and that said Northern Securities Company now holds within the jurisdiction of this court certificates registered in its name on the books of the Northern Pacific Company for

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said common stock so originally received from your orators Harriman and Pierce and for said common stock into which said preferred stock was so converted and certificates substituted as aforesaid."

"Your orators are advised by counsel and, therefore, aver that the effect of said decree of April 9, 1903, as affirmed by the Supreme Court of the United States, was to adjudge that the Northern Securities Company was not a purchaser or owner but simply a custodian of the shares of stock of said railway company acquired and held by it as aforesaid, that it acquired and held possession thereof in violation of said anti-trust act, that it acquired no title thereto and cannot transfer any rights in respect thereof, and that the legal and equitable owners of said shares of the stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company or their assigns."

The prayer of the bill was "that it be decreed that said proposed plan of distribution is illegal and contrary to law and in violation of the rights and equities of your orators, and that the complainants are entitled to the return and transfer to them by the defendant Northern Securities Company of the shares of common stock of said Northern Pacific Railway Company which were so delivered by said Harriman and Pierce and the shares of common stock into which the preferred stock of the Northern Pacific Railway Company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by your orators and such sum in cash as may be just; and that the said defendant, Northern Securities Company, its directors, officers and agents, may be ordered and directed to endorse [261] the certificates now held by it for said stock of the Northern Pacific Railway Company to your said orator Oregon Short Line Railroad Company or in blank, and deliver the same to your orator The Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by it to be held subject to its rights and lien as trustee aforesaid; and that the defendant Northern Securities Company, its directors, officers, agents and employés be perpetually enjoined and

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restrained from in any manner parting with, disposing of, transferring, assigning or distributing any part of said stock of the Northern Pacific Railway Company so received from your orators Harriman and Pierce as aforesaid, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to your orators in exchange for its own stock so issued as aforesaid and said cash; and that your orators have such other or further or general relief against said Northern Securities Company as shall be proper and just under the circumstances of the case.

“Your orators further pray that the defendant Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing said stock of the Northern Pacific Railway Company or any part thereof during the pendency of this suit or any certificates now representing the same.”

The proofs embraced the pleadings and decrees in the suit of *United States v. Northern Securities Company*; the *ex parte* affidavits of Harriman, Hill, and others; the deposition of Harriman taken before the Interstate Commerce Commission at Chicago in January, 1902; the deposition of Harriman taken in the suit of *Minnesota v. Northern Securities Company* in December, 1902; extracts from the minutes of proceedings of the board of directors of the Northern Pacific Railway Company, and of the executive committee and board of directors of the Northern Securities Company.

[262] *Mr. William D. Guthrie*, with whom *Mr. D. T. Watson*, *Mr. R. S. Lovett*, *Mr. Maxwell Erarts*, *Mr. John F. Dillon*, *Mr. R. V. Lindabury* and *Mr. Bainbridge Colby* were on the brief, for petitioners:

As to the power of the court to enter final judgment; this case does not fall under *Smith v. Vulcan Iron Works*, 165 U. S. 518, but under the exceptions in *Mast, Foos Co. v. Stover Mfg. Co.*, 177 U. S. 485, 494, and see *Brill v. Peckham Motor Truck Co.*, 189 U. S. 57, 63.

The Northern Securities Company, having been organized for an illegal purpose and having obtained possession of the

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railway stocks in pursuance of such purpose, could not thereby acquire the title to and ownership of the stocks.

The whole transaction was illegal, *ultra vires* and void from the beginning to the end. It was, legally speaking, a nullity—"an aggregate of nothings." *Scovill v. Thayer*, 105 U. S. 150; *Ashbury Ry. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *Thomas v. Railroad Co.*, 101 U. S. 71; *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 22; *Penna. Co. v. St. L., A. & C. R. R. Co.*, 118 U. S. 290.

The contract is void; the objection is not only that the corporation ought not to have made it, but that it could not make it, that the contract cannot be ratified or confirmed by the stockholders, because it could not have been authorized by them, and that no performance can give the unlawful agreement any validity by way of estoppel or otherwise, or be the foundation of any right. *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 60; *McCormick v. Market Bank*, 165 U. S. 538, 550; *California Bank v. Kennedy*, 167 U. S. 362, 368; *Pullman's Car Co. v. Transportation Co.*, 171 U. S. 138. In fact any contract made in violation of a statute is void, *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 410; *Miller v. Ammon*, 145 U. S. 421, 426; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 548, and it is vain to contend that any right can be acquired under such a contract. *Montgomery v. United States*, 15 Wall. 395, 399; *Desmarc v. United States*, 93 U. S. [263] 605, 612; *Sprott v. United States*, 20 Wall. 459, 461; *United States v. Lapéne*, 17 Wall. 601, 602, 603; *United States v. Grossmayer*, 9 Wall. 72, 76; *The Ouachita Cotton*, 6 Wall. 521, 532; and cases cited in *Bank of the United States v. Owens*, 2 Pet. 527, 541.

Where the purpose and consideration of a contract have failed by reason of illegality resulting in corporate disability to perform, the vendor may rescind and is entitled to restitution of his title. *Chapman v. Douglas County*, 107 U. S. 348; *Am. Table Works v. Boston Machine Co.*, 139 Massachusetts, 5. When property is transferred for an illegal purpose which has been terminated, prevented or abandoned, the holder must return the property on demand. *Louisiana v. Wood*, 102 U. S. 294; *Parkersburg v. Brown*, 106 U. S. 487, 503. To deny a remedy to reclaim it, is to give effect to

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the illegal contract. *Davis v. Old Colony Railroad*, 131 Massachusetts, 258, 275; *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *La Caussade v. White*, 7 D. & E. 535; *Nat. Bank & Loan Co. v. Petrie*, 189 U. S. 423; *Sittel v. Wright*, 122 Fed. Rep. 434; *Railroad Co. v. Railroad Co.*, 66 N. H. 100. The contract having been declared invalid no rights were acquired thereunder. Cases *supra* and *Jacksonville &c. Ry. Co. v. Hooper*, 160 U. S. 514, 524; *Dwight v. Brewster*, 1 Pick. 50, 55. As to invalidity of contracts entered into in violation of statutes see *Langdon v. Branch*, 37 Fed. Rep. 449, 463; *State v. Standard Oil Co.*, 49 Ohio St. 137, 183; *People v. Chicago Gas Trust Co.*, 130 Illinois, 268; *People v. N. R. S. R. Co.*, 121 N. Y. 582; *Cameron v. Havemeyer*, 25 Abb. N. C. 438, 446; *Unckles v. Colgate*, 148 N. Y. 529; *State v. Distilling Co.*, 29 Nebraska, 700.

The question of ownership of stock was involved and decided in the Government suit. 193 U. S. 197, 227; 307, 325, 353, 362. The decree authorized the *return* of the stock, and as it also decided that the combination was illegal it is vain to contend that any rights were acquired under the contract. *Montgomery v. United States*, 15 Wall. 395.

The extent and effect of the decision of any court, as *res* [264] *adjudicata* or as a judicial precedent, must be ascertained, not merely from the decree or mandate, but also from the pleadings and the opinions delivered by the court. It is likewise proper to refer to the evidence before the court and to the arguments of counsel whenever necessary in order to determine exactly what points the court has ruled upon. The court is always at liberty to refer to its own records. *Dimmick v. Tompkins*, 194 U. S. 540, 548; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 217; *Butler v. Eaton*, 141 U. S. 240. Every question directly presented by the issues and discussed and passed upon in the opinions is as much a part of the decision and judgment of the court as if it had been expressly recited in its decree or mandate. So, the mandate of this court is always to be read in the light of its opinion, and it has never been the practice to recite in the mandate any of the points decided, but simply to declare the ultimate conclusion of affirmance, reversal, dismissal or qualification of the decree below. *Last Chance Min. Co. v.*

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Tyler Min. Co., 157 U. S. 683, 690; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 256; *In re Potts*, 166 U. S. 263; *Baker v. Cummings*, 181 U. S. 117, 126; *Nat. Foundry & Co. v. Oconto Water Supply Co.*, 183 U. S. 216, 234; *Northern Securities Co. v. United States*, 193 U. S. 332; *Railroad Companies v. Schutte*, 103 U. S. 118, 143.

As stockholders, the complainants were clearly not strangers to a litigation which involved the right of the corporation to carry out the objects for which it was organized and which affected the title to all its property, received from them. As depositors, they were represented by their custodian, agent or trustee as to its right to hold and the legality of its custodianship. All identified in interest and in privity with one of the litigating parties are concluded by a judgment and entitled to invoke its effect. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396. Even if the decision in the Government suit does not constitute *res adjudicata* in the strict technical sense, it undoubtedly should have been regarded as a controlling judicial precedent on the same facts sufficient to establish *prima facie* all that the complainants were called upon to show on the motion for a preliminary injunction. *Brill v. Peckham Motor Truck Co.*, 189 U. S. 57, 59-63; *American Bell Telephone Co. v. National Imp. Telephone Co.*, 27 Fed. Rep. 663, 664; *Kerr v. New Orleans*, 126 Fed. Rep. 920, 924.

A stockholder is so far an integral part of the corporation that he is considered privy to any legal proceedings touching its status and powers. *Sanger v. Upton*, 91 U. S. 56. See also, *Hawkins v. Glenn*, 131 U. S. 319, 329; *Glenn v. Liggett*, 135 U. S. 533, 444; *Great Western Telegraph Co. v. Purdy*, 162 U. S. 329, 337; 3 Cook on Corporations, 5th ed. § 750; Herman on Estoppel and Res Judicata, 154, 165; *Hale v. Hardon*, 95 Fed. Rep. 747, 759; *Hendrickson v. Bradley*, 85 Fed. Rep. 508, 516; *Wilson v. Seymour*, 76 Fed. Rep. 678, 681; *National Foundry & Pipe Works v. Oconto Water Co.*, 68 Fed. Rep. 1006; *Secor v. Singleton*, 41 Fed. Rep. 725. As the Securities Company was the custodian or trustee of the railway shares deposited with it, it represented the complainants as its *cestui que trustent* and they are bound by

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the decree. *Kerrison v. Stewart*, 93 U. S. 155, 160; *Graham v. Boston, Hartford & Erie R. R. Co.*, 118 U. S. 161, 179; *McCampbell v. Mason*, 151 Illinois, 500, 508; *McElrath v. Pittsburg and Steubenville Railroad Co.*, 68 Pa. St. 37, 40, 41.

In the Government suit certain stockholders of different railroad companies were made defendants as of their respective classes. The judgment therefore bound the whole. *Smith v. Swormstedt*, 16 How. 288, 303.

The court below was in error in holding that the form and not the legal effect of the transaction was controlling.

The assertion of a legal conclusion under such circumstances never operates to estop a party from showing the real facts. *Sturm v. Boker*, 150 U. S. 312, 336; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 342; *Towle v. White*, 29 L. T. N. S. 78; *Heryford v. Davis*, 102 U. S. 235, 243, 244, 246; *Chicago Railway Co. v. Merchants' Bank*, 136 U. S. 268, 280; *McGourkey [266] v. Toledo & Ohio Railway*, 146 U. S. 536, 569; *McNamara v. Culver*, 22 Kansas, 661, 668; *Pugh v. Davis*, 96 U. S. 332, 336.

The bill and proofs in the Government suit were all to effect that the Northern Securities Company was organized to effectuate an illegal *holding* corporation.

In the case of an illegal trust and combination entered into and adjudged to be in violation of an act of Congress, particularly where, at the very inception of any such scheme, its legality is at once publicly challenged by the National Government, justice and sound public policy will be promoted by decreeing the restoration of the *status quo*, and not permitting distribution on the basis of alleged rights acquired under and by virtue of the illegal contract and in disregard and defiance of the pending litigation.

If Mr. Hill and his associates are to be judged as other men are judged and are to be presumed to have contemplated and intended the consequences of their own acts, there can be no escape for them from the conclusion that the present proposed plan of distribution is a willful and deliberate attempt to circumvent the decree in the Government suit, and was, in fact, all along, the alternative intended as part of their original unlawful scheme.

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The Circuit Court in Minnesota did not intend to pass upon or to prejudice or prejudge the merits of a controversy which it declined to consider or decide.

There has been no equitable estoppel created for the benefit of the Northern Securities Company by what the company did or continued to do during the pendency of the Government suit and in defiance of the serious claim therein made, either as to sale of stock, all of the purchasers having notice of the situation, or by the receipt of dividends on the Northern Securities stock by the complainants. *L. & N. Railroad Co. v. Kentucky*, 161 U. S. 677, 691; *Scoville v. Thayer*, 105 U. S. 143, 151; *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 24, 60; *Tieton v. Cofield*, 93 U. S. 163. Illegal acts cannot be given validity by assenting to them or acting under [267] them. If so, a statute could be abrogated by simply contracting to do the prohibited act. Cases *supra* and *Thomas v. Railroad Co.*, 101 U. S. 71, 86; *Veeder v. Mudgett*, 95 N. Y. 295, 310.

The Northern Securities Company claims that because it now holds possession by virtue of an illegal contract between parties *in pari delicto*, the complainants and all other depositors can be allowed no standing in any court of law or equity to reclaim their property. This contention cannot be sustained. Its result obviously would be that the company might dispose of and distribute at will all the property it held without legal accountability to any one. *Farmouth v. France*, 19 Q. B. D. 647, 653; *Northrup v. Graves*, 19 Connecticut, 548, 554; 2 Stephen Cr. Law, 4; *McMullen v. Hoffman*, 174 U. S. 639, 669. Complainants acted in good faith and belief that the Northern Securities Company was not an illegal combination. As to what Congress itself contemplated by the statute is uncertain. See Cong. Rec., 51st Cong., 1st Sess., vol. 21, Pt-3, pp. 2460, 3146, 4089.

Where the illegal purpose cannot be continued and must necessarily be abandoned, the innocent owner of property transferred does not forfeit his legal rights so that he has become outlawed, and cannot maintain an action to recover his property, and the other party may retain the property free from accountability and convert it to his own use or dispose of it as he sees fit, and the one in possession is pro-

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tected in appropriating the property by a maxim of equity. *Nat. Bank & Loan Co. v. Petrie*, 189 U. S. 423.

The rule as to parties *in pari delicto* contemplates the existence of a *delictum*, that is, a wrongful act knowingly done, an intentional "transgression against positive law." Parties are not *in pari delicto* when there is concededly no intentional wrongdoing or crime. Even in criminal cases, satisfactory proof of a mistake of the law, honestly held in consequence of a reasonable, but erroneous, construction of a doubtful statute, often operates to prevent a conviction. *Queen v. [268] Tolson*, 23 Q. B. D. 168, 171; *Taylor v. Newman*, 4 Best & S. 89; *Regina v. Allday*, 8 C. & P. 136; *Rex v. Twose*, 14 Cox C. C. 327; *Reg. v. Sleep*, 8 Cox C. C. 472; *Regina v. Tinkler*, 1 F. & F. 513; *Rider v. Wood*, 2 E. & E. 338; *Buckmaster v. Reynolds*, 13 C. B. (N. S.) 62; *United States v. Conner*, 3 McLean, 573; *United States v. Pearce*, 2 McLean, 14; *Halsted v. State*, 41 N. J. L. 552, 591; *Cutter v. State*, 36 N. J. L. 125; *Stone v. United States*, 167 U. S. 178, 188; *Hedden v. Iselin*, 31 Fed. Rep. 266; *Iowa v. Sheeley*, 15 Iowa, 404; *Commonwealth v. Bradford*, 9 Metc. (Mass.) 268; *State v. Hause*, 71 N. Car. 518; *Dotson v. State*, 6 Coldw. (Tenn.) 545.

As to whether the rule applicable to parties *in pari delicto* applies where the parties have acted in good faith and under a mutual mistake as to the law, see *Spring Co. v. Knowlton*, 103 U. S. 49; *St. Louis Railroad v. Terre Haute Railroad*, 145 U. S. 393; *City of Detroit v. Detroit City Ry. Co.*, 60 Fed. Rep. 161, and *Pullman Palace Car Co. v. Central Transp. Co.*, 65 Fed. Rep. 158.

Relief will be granted from the consequences of a mistake of law, whenever the mistake is clearly proved or admitted and, by reason of such mistake, the party against whom relief is sought would otherwise secure an unfair advantage. *Moses v. Macferlan*, 2 Burrows, 1005, 1012; *Farmer v. Arundel*, 2 W. Bl. 824; *Bingham v. Bingham*, 1 Ves. Sen. 126; Belt's Supp. 79; *Bize v. Dickason*, 1 D. & E. 285; *Earl of Beauchamp v. Winn*, L. R. 6 H. L. 223; *Re Saxon Life Assurance Society*, 2 J. & H. 408; *Jones v. Clifford*, L. R. 3 Ch. D. 779; *Allcard v. Walker* [1896], 2 Ch. 369, 381;

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Griswold v. Hazard, 141 U. S. 260, 284; *Spring Co. v. Knowlton*, 103 U. S. 49, 60; *Snell v. Insurance Co.*, 98 U. S. 85; *Hunt v. Rousmanier*, 8 Wheat. 174, 215; *S. C.*, 1 Pet. 1, 17; *State v. Paup*, 13 Arkansas, 129, 138; *Griffith v. Sabastian County*, 49 Arkansas, 24, 34; *Northrop v. Graves*, 19 Connecticut, 548, 554; *Stedwell v. Anderson*, 21 Connecticut, 139, 144; *Culbreath v. Culbreath*, 7 Georgia, 64; *Underwood v. Brockman*, 4 Dana (Ky.), 309, 317; *Ray & Thornton v. Bank*, 3 B. Mon. (Ky.) 510; *Stockbridge Iron Com- [269] pany v. Hudson Iron Company*, 102 Massachusetts, 45; *Lowndes v. Chisholm*, 2 McCord Ch. (S. C.) 455; *Mortimer v. Pritchard*, Bailey Eq. (S. C.) 505; *Hopkins v. Mazyck*, 1 Hill Ch. (S. C.) 242; 250; *MacKay v. Smith*, 27 Washington, 442.

When an illegal contract is sought to be specifically enforced or when damages are claimed for its breach, undoubtedly the sound rule is that the difference between *malum prohibitum* and *malum in se* is immaterial. *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 412.

But the distinction between *malum prohibitum* and *malum in se* has been often recognized by the courts when considering the right to recover property transferred under an illegal contract, upon disaffirmance or termination of the illegal transaction, under circumstances which result in a failure of consideration. Where the transaction involves moral turpitude, such as the giving of a bribe, or facilitating the commission of an immoral act or a heinous crime, the party is so clearly culpable and deserving of punishment that the courts will refuse to lend him any assistance against another party to the immoral transaction, but will leave both parties where their own immoral conduct has placed them. Where, however, the act involves no moral turpitude, but is merely *malum prohibitum* as distinguished from *malum in se*, relief has often been granted by restoring the *status quo* so far as practicable. *Pratt v. Short*, 79 N. Y. 437, 445. For distinction between *malum prohibitum* and *malum in se* see *Stock Yards v. Railroad Co.*, 196 U. S. 217; *Spring Co. v. Knowlton*, 103 U. S. 49; *McCutcheon v. Merz Co.*, 71 Fed. Rep. 787, 789; *Parkersburg v. Brown*, 106 U. S. 487; *Bank v. Townsend*, 139 U. S. 67, 75.

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In this case the transaction was not *malum in se* all the parties believed they were not violating the law. The transaction was not forbidden by the common law. *In re Greene*, 52 Fed. Rep. 104, 111; *Mogul Steamship Company v. McGregor, Gow & Co.*, 23 Q. B. D. 598, 619, 626; [1892] A. C. 25; *United States v. Freight Association*, 166 U. S. 290, 334; *United States v. Joint Traffic Association*, 171 U. S. 505, 572. It was [270] also apparently legal according to the law of New Jersey where it occurred. New Jersey Corporation Act, revision of 1896, §§ 49, 51; Dill. on Corp. 88, 93; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 524; *Ansboro v. United States*, 159 U. S. 695. The transaction was at most *malum prohibitum*. *Tappenden v. Randall*, 2 B. & P. 467, 470; *Ex parte Bulmer*, 13 Vesey, 313; *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Lowell v. Boston and Lowell Railroad Corporation*, 23 Pick. (Mass.) 24, 32; *Washington Gas Co. v. Dist. of Columbia*, 161 U. S. 316, 327; *Hanauer v. Doane*, 12 Wall. 342; *Douglass v. Kavanaugh*, 90 Fed. Rep. 373.

Where money or property has been deposited with a trustee or stakeholder the doctrine of *in pari delicto* does not apply. A mere custodian as was the Securities Company cannot take advantage of the illegality of the transaction but must return the property to the owners. *Brooks v. Martin*, 2 Wall. 70, 80; *Planters' Bank v. Union Bank*, 16 Wall. 483, 500; *Block v. Darling*, 140 U. S. 234; *Pointer v. Smith*, 7 Heisk. (Tenn.) 137, 144; *Railroad v. Railroad*, 66 N. H. 100, 131; *Newbold v. Sims*, 2 S. & R. (Pa.) 317; *Jeffrey v. Ficklin and Bennett*, 3 Arkansas, 227, 236; *Barrett v. Neil, Wright* (Ohio), 472; *Skinner v. Henderson*, 10 Missouri, 205; *Walker v. Chapman, Lofft*, 342; *Wassermann v. Sloss*, 117 California, 425; *Morgan v. Groff*, 4 Barb. (N. Y.) 524; *Barnard v. Taylor*, 23 Oregon, 416, 422; *S. C.*, 18 L. R. A. 859; *Kiewert v. Rindskopf*, 46 Wisconsin, 481; *Douville v. Merrick*, 25 Wisconsin, 688; *Bone v. Ekless*, 5 H. & N. 925; *Wright v. Stewart*, 130 Fed. Rep. 905, 921; *Dauler v. Hartley*, 178 Pa. St. 23; *Mallory v. Oil Works*, 86 Tennessee, 598, 606; *Dwight v. Brewster*, 1 Pick. (Mass.) 50, 55; *Sampson v. Shaw, Executor*, 101 Massachusetts, 145, 151; *Morgan v. Beaumont*, 121 Massachusetts, 7; *Clarke, Harrison & Company v. Brown*, 77 Georgia,

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606; *Shannon v. Baumer*, 10 Iowa, 210; *Taylor v. Bowers*, 1 Q. B. D. 291; *In re Cronmire, ex parte Waud* [1898], 2 Q. B. 383; *Kinsman v. Parkhurst*, 18 How. 289.

The contention of the Northern Securities Company that the illegal contract had been executed, and that this precluded [271] any relief to the complainants, is fallacious and cannot be sustained. *Northern Securities Co. v. United States*, 193 U. S. 197, 357.

A universally recognized exception to the rule concerning parties *in pari delicto* is that the courts will permit the recovery of property delivered and held under an illegal contract which has been terminated *in fieri*, when the public interests will be advanced thereby. *Starke's Exrs. v. Littlepage*, 4 Rand. (Va.) 368; *O'Conner v. Ward*, 60 Mississippi, 1025, 1037; 5 Thompson on Corp. § 6410; 2 Pomeroy's Eq. § 941; Story's Eq. Jur. § 298.

These complainants can follow the common Northern Pacific stock obtained by the Northern Securities Company by the conversion of the preferred stock. Where specific property belonging to another is changed by a custodian, bailee, trustee or agent into other property or funds, the original owner is entitled to follow it as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail. *National Bank v. Insurance Co.*, 104 U. S. 54, 68. See also *Silsbury v. McCoon*, 3 N. Y. 379, 390; *McLarren v. Brewer*, 51 Maine, 402, 404.

The real nature of the transaction was not changed by the conversion of stock. It was not an independent subscription for bonds.

The issue of the convertible certificates, the retirement of the preferred stock, and the conversion of the convertible certificates into common stock, are shown to have taken place all on the same day as part of one transaction and the securities are traceable. This was the only way it could be done under the laws of Wisconsin and the corporate powers of the Northern Pacific Railway Company. *Weidenfeld v. Northern Pacific Ry. Co.*, 129 Fed. Rep. 305; Laws Wisconsin, 1895, ch. 244, § 10; *Scovill v. Thayer*, 105 U. S. 143; *Hamor v. Taylor-Rice Engineering Co.*, 84 Fed. Rep. 392; *Trevor v. Whitworth*, L. R. 12 App. Cas. 409, 416.

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There is no merit in the fierce attack made on behalf of the [272] Securities Company upon the motives of the complainants in instituting this suit and the announcement that if complainants prevailed and recovered their property, the so-called Union Pacific Railroad System would secure control of the Northern Pacific Railway Company nor should this consideration influence the court, change the rules of law, and produce a different result than if this feature did not exist

This court will not consider the motives of parties in instituting legal proceedings to protect their alleged legal or equitable rights. *Dickerman v. Trust Co.*, 176 U. S. 181, 190; *South Dakota v. North Carolina*, 192 U. S. 286, 311. There is an uncontradicted statement in the record that the roads are not parallel and competitive. And see also *Louisville and Nashville v. Kentucky*, 161 U. S. 677, 698. The real competitive lines are the Great Northern and the Northern Pacific and it has been the motive of those in control of the Great Northern to stifle competition.

If the railway shares deposited are not to be returned but to be regarded as assets of the Securities Company then the corporation should sell the stocks and make the distribution in cash. *Mason v. Pewabic Mining Co.*, 133 U. S. 50, 63; *Kean v. Johnson*, 9 N. J. Eq. 401, 408, 409; *Coler v. Tacoma Railway and Power Co.*, 64 N. J. Eq. 117, 125; *S. C.*, 54 Atl. Rep. 413. It is so in the case of a partnership. *Lindley on Part.*, 555, and much stronger are the reasons for such course in the case of a corporation. 4 *Thompson on Corp.* § 4548; 2 *Cook on Corp.* § 671. As to § 54, Corporation Act of New Jersey, Revision of 1896, see *Beals v. Hale*, 4 How. 37, 54.

Mr. D. T. Watson also for petitioners:

This court, in the Government case decided that the Securities Company was not the lawful purchaser or absolute owner of the capital stock of the Northern Pacific Railway Company assigned to it by appellants, but held it as custodian for the appellants. 193 U. S. 325, 334, 346, 353, 361, 365, 390, 400. The decree authorized the return of the stock to the original [273] stockholders of the constituent companies. The Securities Company cannot hold the railway

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stock and prevent giving relief to complainants under the doctrine of *in pari delicto*.

By the affirmance of this court the decree of the Circuit Court became the decree of this court and binding upon all parties and privies and other courts. *In re Potts*, 166 U. S. 265; *Durant v. Essex County*, 101 U. S. 555; *Sandford & Co., Petitioner*, 160 U. S. 247. The opinion of this court is part of the record and may be freely resorted to to determine what this court has decided. *Foundry Co. v. Water Co.*, 183 U. S. 217; *Baker v. Cummings*, 181 U. S. 124; *Mining Co. v. Mining Co.*, 157 U. S. 683, 690; *So. Pac. Co. v. United States*, 183 U. S. 519, 532; *United States v. Norfolk Railway Co.*, 114 Fed. Rep. 686; *Russell v. Russell*, 129 Fed. Rep. 434; *West v. Brashear*, 14 Pet. 342; *DeSollar v. Hanscome*, 158 U. S. 221; *Cromwell v. County of Sac*, 94 U. S. 359; *Strong v. Grant*, 2 Sup. Ct. D. C. 222; *Fulton v. Pomeroy*, 111 Wisconsin, 668; *Barton's Suit in Equity*, 150; *Equity Rule*, 86; *Putnam v. Day*, 22 Wall. 66.

As parties by representation in the Government case, complainants are entitled in their own right to plead or give in evidence against, and as binding upon, the Securities Company, the conclusions in that case on the same questions which arise in this—even if the cause of action, parties, testimony and measure of relief in the two suits are different. *Cromwell v. County of Sac*, 94 U. S. 352; *Lumber Co. v. Buchtel*, 101 U. S. 638; *So. Pac. R. R. Co. v. United States*, 168 U. S. 48; *Black on Judgments*, 609, 614; *Burten v. Shannon*, 99 Massachusetts, 202; *Railway Co. v. Schutte*, 103 U. S. 143; *Duchess of Kingston Case*, 20 Howell's State Trials, 355.

The appellants, as parties by representation in the Government case, are entitled in their own right to set up and assert the decree in that case as against the Northern Securities Company in this case. *Story Eq. Pl. § 372*; 2 *Daniel's Ch. Pl. & Pr.* 1539; *Wilton's Appeal*, 97 Pa. 393; *Griffin v. Spence*, 69 Georgia, 397.

[274] It is not necessary that all the parties to the Government suit should be the same in the subsequent litigation. *Thompson v. Roberts*, 24 How. 240; *Smith v. Kernochen*, 7 How. 217; *Wilson v. Buell*, 117 Indiana, 315, 318; *Wells on*

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Res Adjudicata, § 35; *Lawrence v. Hunt*, 10 Wend. 80; Freeman on Judgments, § 154; 1 Greenleaf, § 523; *Green v. Bogue*, 158 U. S. 478, 502.

Where there are several grounds of recovery or defense on which the decree may have been rested, it will be conclusive on the specific findings, which led up to the proposition, on which the court decided the case, and what that ground was may be determined by evidence *aliunde* where the decree itself is silent on it. *Russell v. Place*, 94 U. S. 606; *DeSollar v. Hanscome*, 158 U. S. 216; *Flint Nat. Bk. v. Covington*, 129 Fed. Rep. 798; *Hawes v. Water Co.*, 5 Sawyer, 287; *Corcoran v. Ches. Canal Co.*, 94 U. S. 741.

The former opinion and decree of this court is conclusive even on this court when the same case comes back here, and certainly so where that former opinion and decree is set up as conclusive in another litigation where the parties are not all the same, and where the complainant in the former case, the United States, is not a party to the second. *Roberts v. Cooper*, 20 How. 467, 481; *Barney v. Winona &c. R. R. Co.*, 117 U. S. 231; *United States v. Camon*, 184 U. S. 574; *Thompson v. Maxwell &c. Co.*, 168 U. S. 456; *Yazoo &c. Ry. Co. v. Adams*, 180 U. S. 7; *Great Western Tile Co. v. Burnaham*, 162 U. S. 343; *Chaffin v. Taylor*, 116 U. S. 567; *Clark v. Keith*, 106 U. S. 464; *Supervisors v. Kenniott*, 94 U. S. 498; *Tyler v. Maguire*, 17 Wall. 283.

The appellants were by representation parties and privies in the Government case, as stockholders of the Securities Company, as of class represented by Morgan, Hill and others, as *cestuis que trust*, and as stockholders of the Northern Pacific Railway they are therefore in their own right entitled to set up the findings and conclusions of this court in that case as *res adjudicata* in any subsequent litigation between them- [275] selves and the Northern Securities Company so far as regards the issues raised and decided in that case. 3 Cook on Corp. § 750; *Hendrickson v. Bradley*, 85 Fed. Rep. 516; *Foundry Co. v. Water Co.*, 68 Fed. Rep. 1007; *Wilson v. Seymour*, 76 Fed. Rep. 681; Herman on Estoppel, 154-165; *Secor v. Singleton*, 41 Fed. Rep. 725; *Gt. West. Tel. Co. v. Purdy*, 162 U. S. 329; *Hawkins v. Glenn*, 131 U. S. 319; *Glenn v. Williams*, 60 Maryland, 93, 116; *Hancock*

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Bank v. Farmers, 176 U. S. 640; *Sanger v. Upton*, 91 U. S. 56; *Whitman v. Bank*, 176 U. S. 560; *Flash v. Conn.*, 109 U. S. 371; *Hall v. Hardon*, 95 Fed. Rep. 759; *Fruit Co. v. Railroad Co.*, 89 Fed. Rep. 24; *McElrath v. P. & S. R. Co.*, 68 Pa. St. 40; *Shaw v. Railroad Co.*, 105 U. S. 605; *Kerri-son v. Stewart*, 93 U. S. 160; *Vetterlein v. Barnes*, 124 U. S. 169; *Beals v. Railway Co.*, 133 U. S. 290; *Kent v. Lake Superior Co.*, 114 U. S. 90; *Manson v. Duncannon*, 166 U. S. 542; *Smith v. Swormstedt*, 16 How. 288; *McIntosh v. Pitts-burg*, 112 Fed. Rep. 705; *Willoughby v. Chicago &c. R. R. Co.*, 50 N. J. 609.

Complainants in this case are entitled to set up and plead as *res adjudicata* the findings, conclusions and decree of this court in the Government case as hereinbefore enumerated, even if the cause of action in the Government case was different from the cause of action in the present case.

The decision in the Government case caused the present litigation. This case is the child of that parent. The parties to the present case, the appellants and the Northern Securities Company, were parties to the Government case, and in the same capacity.

The subject matter of the present litigation is 717,320 shares of the capital stock of the Northern Pacific Railway Company, and this identical capital stock was the stock which the complainants assigned to the Northern Securities Company for the purpose of carrying out the combination.

The averments of the bill and answers in the Government case distinctly raised, *inter alia*, as material numerous questions upon which the controversy turned, questions which [276] are in substance, the same as are now restated in somewhat different form.

These stocks in the two railroad companies which, as averred in the bill in the Government case, and as found by this court, were transferred by Hill, Morgan and other stockholders to the Securities Company in pursuance of, and to perfect the illegal combination to restrain trade and commerce, included the stock owned by the Oregon Short Line Railroad Company, and held in the name of Harriman and Pierce as trustees, being the identical stock in controversy in this case.

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This court had before it in the Government case all the testimony which was before the Court of Appeals in the present case as to the manner in which, and the purpose for which, the Securities Company acquired the Oregon Short Line stock in the Northern Pacific Railway Company, and this included the evidence of Mr. Harriman.

Not only did the pleadings sharply raise the issues in the Government case which are also in this case,—and this court discussed these issues and decided them,—but the evidence in the Government case, including all of Mr. Harriman's, supported the conclusions of this court on those issues.

The so-called permissive portion of the decree certainly did authorize the return by the Securities Company to the individual stockholders who assigned to the Securities Company the identical stock so assigned. If it was Northern Pacific stock, then Northern Pacific stock was to be returned.

The St. Paul opinion of Judge Thayer misconstrued the St. Louis decree as the St. Louis court did not make, as the controlling question in the case, the distinction between the real, substantial ownership and the mere holding of the railroad stocks as custodian that this court did.

The Court of Appeals erred in deciding that this court did not even "incidentally" consider the question of ownership and deciding this case as if the Government case had not arisen.

The equities of the case are with complainants.

All parties fully believed this plan to be lawful and really [277] beneficial to commerce, but this court adjudged it was a violation of the Sherman Act, and made a decree which restrained the Securities Company from carrying out the scheme and rendered the railway stock worthless in its possession. This necessitated a dissolution of the Securities Company, as the Supreme Court foresaw.

Evidently, the scheme having failed, this put every one in *statu quo*, ante as to the transfer to the Securities Company of their respective stocks—and this could only be done by retransferring to each his stock, the Securities Company still holds it—each still holds his Securities Company stock. The retransfer is simple. If there be strangers who came in afterwards and who have equities, do what is fair to them.

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Whoever bought stock after March 10, 1902, had notice *pendente lite* and is concluded by the decree. *Tilton v. Cofield*, 93 U. S. 163. Hill, Morgan and Company are taking the property and seeking shelter behind either one of two innocent holders. They control the Securities Company and therefore owe complainants good faith but having induced complainants to put their stock into the Securities Company now they intend to avail of the situation to make money and secure control of the railway companies for themselves.

The Securities Company cannot compel complainants to accept Great Northern stock in lieu of their Northern Pacific. The stockholders of a corporation upon dissolution cannot be compelled to accept a distribution of their share of the assets in kind. *Post v. Beacon & Co.*, 84 Fed. Rep. 369, 375; *Mason v. Pewabic Mining Co.*, 132 U. S. 50, 58.

As to when the Circuit Court of Appeals may, on an appeal from an interlocutory decree, enter a final one, see *Forsythe v. Hammond*, 166 U. S. 512; *Smith v. Vulcan Iron Works*, 165 U. S. 524; *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 494; *Britt v. Peckham Motor Co.*, 189 U. S. 58, from which it appears that the present case is not one where the Circuit Court of Appeals on an appeal from an interlocutory order granting a [278] preliminary injunction, could enter what is practically a final decree, and finally dispose of the case on the merits.

The necessity for a hearing in the ordinary way where each side could put in all its proofs, cross-examine witnesses, compel the attendance of hostile witnesses and the production of all books and papers, is not only apparent from the complications in this case, but is further shown by the inaccuracy which the Circuit Court of Appeals fell into in finally considering and passing on the case merely on an interlocutory hearing and upon *ex parte* affidavits.

Mr. Elihu Root, with whom *Mr. Francis Lynde Stetson* was on the brief, for respondent:

Everything in the record, by mere recital and without argument, shows that in fact and by intent of both parties, there was a sale of the Northern Pacific stock to the Securities Company in consideration of a stockholder's interest

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in that company, and a large sum of money—*i. e.*, the issue to Harriman and Pierce of 824,918 shares of the stock and the payment to them of \$8,915,629 in cash.

The complainants are estopped from asserting that the Securities Company is a trustee or bailee. They have publicly held out the Securities Company to be the owner of the railway stocks, and have induced innocent third persons to acquire interests in the corporation in reliance thereupon.

But whether the Securities Company be a vendee or a custodian, the complainants are not entitled to recover the Northern Pacific stock. The transaction was in contravention of public policy and a penal statute, and their demand for the return of the stock by them delivered for such illegal purpose, is barred by the rule *In pari delicto potior est conditio defendentis et possidentis*. The complainants cannot avoid the bar of the rule, if the Securities Company be regarded as vendee. The complainants and the Securities Company are *in pari delicto*.

Neither can the complainants avoid the operation of the rule by treating the Securities Company merely as custodian, [279] to hold a deposited stock, to collect dividends, etc. The Securities Company is *in pari delicto* with the complainants. It was an active party to the illegality.

The complainants assisted in placing the control of the railway companies in the hands of the Securities Company, and in maintaining that status until the decree in the Government suit was affirmed by the Supreme Court. This executed the illegal purpose to such a degree as to bar the assertion of any right to withdraw the property deposited.

Property delivered under an illegal contract cannot be recovered back by any party *in pari delicto*; certainly not in any case where the contract has been executed in whole or in part. *Scott v. Brown*, L. R. [1892] 2 Q. B. 724; *Hill v. Freeman*, 73 Alabama, 200; *Thornhill v. O'Rear*, 108 Alabama, 299; *Inhabitants &c. v. Eaton*, 11 Massachusetts, 368; *Atwood v. Fisk*, 101 Massachusetts, 353; *Myers v. Meinrath*, 101 Massachusetts, 366; *Horton v. Buffington*, 105 Massachusetts, 399; *Cranson v. Goss*, 107 Massachusetts, 439; *Traders' Bank v. Steere*, 165 Massachusetts, 389; *White v. Hunter*, 23 N. H. 128; *Ellicott v. Chamberlin*, 38 N. J. Eq.

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604; *Hope v. Linden Assn.*, 29 Vroom, 627; *Allebach v. Hunsicker*, 132 Pa. St. 139; *Moore v. Kendall*, 52 Am. Dec. 145; *Cohn v. Heimbauch*, 86 Wisconsin, 176; *Bank of U. S. v. Owens*, 2 Pet. 527; *Vandalia case*, 145 U. S. 393; *Central Co. v. Pullman Co.*, 139 U. S. 24; *Equitable Society v. Wetherill*, 127 Fed. Rep. 946; Pomeroy's Equity Juris, § 939; Addison on Contracts: Domat.

After delivery of the property for an accepted consideration, the contract has ceased to be executory, even though it was entered into with the expectation of a continuity of benefits no longer susceptible of complete realization. *Kearley v. Thomson*, L. R. 24 Q. B. D. 742; *Herman v. Jeuchner*, L. R. 12 Q. B. D. 561; *Harse v. Pearl L. Co.*, L. R. [1904] 1 K. B. 558; *Vandalia case*, 145 U. S. 393; *Equitable Society v. Wetherill*, 127 Fed. Rep. 946; *McIntosh v. Wilson*, 81 Iowa, 339; *Atwood v. Fisk*, 101 Massachusetts, 353; *Bruer v. Kansas Ins. Co.*, 100 Mo. App. 540; *Ellicott v. Chamberlin*, 38 N. J. [280] Eq. 604; Pollock, Principles of Contract, 364; *Miller v. Larson*, 19 Wisconsin, 463; *Martin v. Wade*, 37 California, 168.

The indisposition of the court to grant relief is not limited to the cases in which the plaintiff is endeavoring to enforce the contract; a party exhibiting the contract merely to denounce it as illegal will be denied judicial assistance. *Taylor v. Chester*, L. R. 4 Q. B. 309; *Brindley v. Lawton*, 53 N. J. Eq. 259; *Hope v. Linden Association*, 29 Vroom, 627; *Herman v. Jeuchner*, L. R. 12 Q. B. D. 561; *Kearley v. Thomson*, L. R. 24 Q. B. D. 742; *Harse v. Pearl Co.*, L. R. [1904] 1 K. B. 558; *Hill v. Freeman*, 73 Alabama, 200; *Watkins v. Nugen*, 45 S. E. Rep. 262; *McIntosh v. Wilson*, 81 Iowa, 339; *Atwood v. Fisk*, 101 Massachusetts, 353; *Myers v. Meinrath*, 101 Massachusetts, 366; *Bagg v. Jerome*, 7 Michigan, 145; *White v. Hunter*, 23 N. H. 128; *Ellicott v. Chamberlin*, 38 N. J. Eq. 604; *Markley v. Village*, 51 N. E. Rep. 28; *Moore v. Kendall*, 52 Am. Dec. 145; *Equitable Life Assurance Society v. Wetherill*, 127 Fed. Rep. 946.

In all such cases the defendant's possession is a sufficient answer to the plaintiff's demand; both because such possession stands as the equivalent of a title in the defendant, and because to discourage such transactions, courts will be deaf

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to the clamor of a complainant *in pari delicto*. *Myers v. Meinrath*, 101 Massachusetts, 366; *Horton v. Buffington*, 105 Massachusetts, 399; *Bagg v. Jerome*, 7 Michigan 145; *Smith v. Bean*, 15 N. H. 577; *Watkins v. Nugen*, 45 S. E. Rep. 262; *McIntosh v. Wilson*, 81 Iowa, 339; *Traders' National Bank v. Steere*, 165 Massachusetts, 389; *Harris*, Sunday Laws, § 169.

The condition of the possessor is so much better than that even of the original owner, that the possessor can recover the property not only from a stranger but from such original owner, if by chance the latter has been able to repossess himself of the property. *Kinney v. McDermott*, 55 Iowa, 674; *Smith v. Bean*, 17 N. H. 577; *Thompson v. Williams*, 58 N. H. 248; *Cohn v. Heimbauch*, 86 Wisconsin, 176.

[281] The distinction between *mala in se*, and *mala prohibita* has been abandoned, but were this otherwise, there is authority for regarding as *malum in se* any act contravening public policy and a penal statute. *Irwin v. Curie*, 171 N. Y. 409, 415; *Gibbs v. Gas Co.*, 130 U. S. 396; *McMullen v. Hoffman*, 174 U. S. 639; *Equitable Society v. Wetherill*, 127 Fed. Rep. 946.

The doctrine of *locus pœnitentiæ* is available only to those who seasonably seek to make restitution and to withdraw from their illegal executory contract. Laches is a fatal vice. *Vandalia case*, 145 U. S. 393; *Union T. Co. v. Illinois Co.*, 117 U. S. 434; *In re Great Berlin S. Co.*, 26 Ch. D. 616; *Hardwood v. Railroad Co.*, 17 Wall. 80; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Grimes v. Sanders*, 93 U. S. 55, 62; *Haywood v. Nat. Bank*, 96 U. S. 611, 617; *McLean v. Clapp*, 141 U. S. 429, 432; *Hoyt v. Latham*, 143 U. S. 553, 567; *Townsend v. Vanderworker*, 160 U. S. 171; *Ward v. Sherman*, 192 U. S. 168; *Rugan v. Sabin*, 53 Fed. Rep. 415, 418; *Kinney v. Webb*, 54 Fed. Rep. 34; *Boston R. R. v. New York R. R.*, 13 R. I. 264; *Kitchen v. St. Louis Ry. Co.*, 69 Missouri, 224; *Peabody et al. v. Flint*, 6 Allen, 56; *Dunphy v. Travelers' Assn.*, 16 N. E. Rep. 426; *Graham v. Birkhead*, 2 McN. & G. 156.

The rigor of the rule against the complainant is never relaxed out of consideration for him, but only when neces-

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sary to promote equity and justice. *Pullman Co. v. Central Co.*, 171 U. S. 138; *Spring Co. v. Knowlton*, 103 U. S. 49.

In cases presenting no such special considerations of equity, justice or public policy, a party even to an unexecuted illegal contract cannot recover back money paid or property delivered thereunder. *Scott v. Brown*, L. R. [1892] 2 Q. B. 724; *In re Great Berlin S. Co.*, 26 Ch. D. 616; *McIntosh v. Wilson*, 81 Iowa, 339; *Bruer v. Kansas Ins Co.*, 100 Mo. App. 540; *Thompson v. Williams*, 58 N. H. 248; *Markley v. Village*, 51 N. E. Rep. 28; *Storz v. Finkelstein*, 46 Nebraska, 477.

As to Northern Pacific preferred stock retirement see *Hackett v. Northern Pacific Ry. Co.*, 36 Misc. 583.

[282] *Mr. John G. Johnson*, with whom *Mr. John W. Griggs* and *Mr. W. P. Clough* were on the brief, also for respondent:

On appeal from an interlocutory decree granting a special injunction in a suit for establishing title to property, if the record fully and fairly discloses the case on the point of title, the Appellate Court not only may, but rightfully should, determine the question of the injunction upon the merits of plaintiff's claim. The action of the Circuit Court of Appeals in this case was controlled by that rule, and proceeded upon it. 1 High on Injunction, 3d ed. § 7; *Knoxville v. Africa*, 47 U. S. App. 74; *Bissell Co. v. Goshen Co.*, 43 C. C. A. 47; *Shinkle v. Louisville & Nashville*, 62 Fed. Rep. 690; *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485.

If, up to the time of argument of the appeal in the Circuit Court of Appeals, plaintiffs had been entitled to a stay of the *pro rata* plan of distribution, until opportunity could be given for fair argument and advisement upon the law points involved in their claim, such right was exhausted by their opportunity to be heard in the Circuit Court of Appeals.

In the Circuit Court of Appeals, therefore, the whole case for an injunction, *pendente lite*, was thrown back upon the first ground of the Circuit Court, viz., "grave and difficult" questions of fact, for ultimate determination.

The bill claims two distinct parcels of stock, one of which complainants never owned.

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Plaintiffs' claims are self-contradictory and can be established, if at all, only under rules of common law. Equity rules cannot be invoked in their support.

The facts constituting title to the stock in controversy necessarily consist of, and are limited to, the things said and done, and mutually intended, by Harriman and Pierce on the one part, and the Securities Company on the other. As all material facts in regard to those sayings, doings and mutual intentions appear in this record, the entire case, on both sides, relating to title, must be here and can be disposed of.

[283] The Union Pacific owns the Oregon Short Line. The latter owns the Oregon Railway and Navigation Company.

As to effect of acquisition of control of the stock of a competing road made by a railway company, and by the stockholders of a railway company see the *Pearsall case*, 161 U. S. 646; *Kentucky v. Louisville & Nashville*, 161 U. S. 676.

Plaintiffs in effect ask the court to place control of the Northern Pacific system of railways in the hands of the Union Pacific Railroad Company. Of the relative geographical positions of the Union Pacific and the Northern Pacific Railway systems, and of the public laws of the several States on the subject of railway combinations, as well as of the Federal laws on the same subject, the court will take notice without proofs.

The burden of proof is on plaintiffs to show, by proper evidence, that the sale to Securities Company was different from what, on its face, it appears to have been. No such proof was tendered.

Plaintiffs really found their claims on what they assert to have been adjudicated in the Government suit, and not on what was actually done and intended by the parties. The plaintiffs were strangers to that suit.

For the assumed adjudication in their favor, plaintiffs rely not on the decree, but upon the opinion of Mr. Justice Harlan which does not, however, mean what plaintiffs claim, and their alternate theory, that the title of Securities Company was subject to a condition, since broken, is unsupported by fact, law or adjudication.

Where there has been a transfer of property, illegal from

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any cause, and possession has been delivered to the person to whom the title under the transfer was intended ultimately to go, the transaction has become executed on the part of the transferrer, and he cannot thereafter repudiate it and reclaim the property because of the illegality.

This rule governs under all forms of illegality; whether in doing something which the laws positively prohibit, or something which they merely omit to allow. *Thomas v. Railroad* [284] *Co.*, 101 U. S. 71, 83; *Vandalia case*, 145 U. S. 393, 399, 408; *Central Co. v. Pullman Co.*, 139 U. S. 24.

When complainants had transferred the Northern Pacific shares to the Securities Company, and the latter had made payment of the price therefor by handing over to them the cash and the certificates for its own stock, coming to them, nothing remained executory between the parties save the implied mutual obligations concerning the Northern Securities stock resulting from the relation of corporation and stockholder, thus created.

Mr. Thomas Thacher also submitted a brief for respondent:

The injunction *pendente lite* can be justified only upon the theory that it is a necessary incident to the granting of such final relief as the complainants appear to be entitled to. The right to such final relief must appear; if not, the injunction was error. If such right did not appear, the question of granting or denying the injunction was not addressed to the discretion of the court. If, upon the record, it does not appear that the complainants are entitled to recover this stock the order appealed from was erroneous and should be reversed. *Brooklyn Club v. McGuire*, 116 Fed. Rep. 783; *Home Ins. Co. v. Nobles*, 63 Fed. Rep. 643; *Central Stock Yards Co. v. L. & N. R. R. Co.*, 112 Fed. Rep. 823; *Stevens v. M., K. & T. Ry. Co.*, 106 Fed. Rep. 771; *Amelia Milling Co. v. Tennessee C. I. & R. Co.*, 123 Fed. Rep. 811.

In some cases "a probable right" is deemed enough. *New Memphis Gas Co. v. Memphis*, 72 Fed. Rep. 952; *Indianapolis Gas Co. v. Indianapolis*, 82 Fed. Rep. 245; *Reduction Works v. California Co.*, 94 Fed. Rep. 694; *Georgia v. Brailsford*, 2 Dallas, 402; or a "*prima facie* right" *Charles v. Marion*, 98 Fed. Rep. 166; *Cosmos Exploration Co. v.*

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Grey Eagle Oil Co., 104 Fed. Rep. 20; *Utah N. & C. R. R. Co. v. Utah N. & C. Ry. Co.*, 110 Fed. Rep. 879. As to preservation of *status quo* see *Allison v. Corson*, 88 Fed. Rep. 581; *Denver & R. G. R. R. Co. v. United States*, 124 Fed. Rep. 156; *Haddon v. Dooley*, [285] 74 Fed. Rep. 429; *Cartersville Light Co. v. Cartersville*, 114 Fed. Rep. 699; *Cohen v. Delavina*, 104 Fed. Rep. 946; *Newton v. Lewis*, 79 Fed. Rep. 715; *West. U. Tel. Co. v. Pennsylvania R. R. Co.*, 123 Fed. Rep. 33.

On appeals from injunction orders the court will not only consider the merits but dismiss the bill, if it can see that the complainant is not entitled to final decree. *Smith v. Vulcan Iron Works*, 165 U. S. 518; *Mast, Fooz & Co. case*, 177 U. S. 485; *Castner v. Coffman*, 178 U. S. 168; *Knoxville v. Africa*, 77 Fed. Rep. 501; *Bissell Co. v. Goshen Co.*, 72 Fed. Rep. 545.

If the argument of the complainants, therefore, still rests upon the theory of *res adjudicata*, that is upon the effect of the decrees in the Government suit, or upon any other theory concerning which the facts are substantially undisputed, this court, finding such theory unsound, will not simply reverse the injunction order, but dismiss the bill.

It was not the legal effect of the decree in the Government suit that title to the stocks of the Northern Pacific Railway Company and the Great Northern Railway Company, which the Securities Company now holds, never passed to the last-named company. See opinions 193 U. S. 197, 321, 324, 327, 334, 344, 357.

It does not follow as matter of law, from the facts shown by the record, including the decree, that title to these stocks did not pass to the Securities Company. The transaction was not void because illegal. *Harris v. Runnels*, 12 How. 79; *Mining Co. v. National Bank*, 96 U. S. 641; *National Bank v. Mathews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Logan County Bank v. Townsend*, 139 U. S. 67, 76; *Thompson v. St. Nicholas Nat. Bank*, 146 U. S. 240, 251; *Scott v. Deweese*, 181 U. S. 202, 211; *Burck v. Taylor*, 152 U. S. 634, 648; *Frits v. Palmer*, 132 U. S. 282; *McBroom v. Investment Co.*, 153 U. S. 318; *Jarvis Trust Company v.*

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Willhoit, 84 Fed. Rep. 514; *Central Trust Co. v. Columbus Ry. Co.*, 87 Fed. Rep. 815; *Terminal Co. v. Trust Co.*, 82 Fed. Rep. 134; *Chattanooga S. R. Co. v. Evans*, 66 Fed. Rep. 809, 815.

[286] The Sherman Anti-Trust Act expressly contemplates that contracts may be made in violation of the statute under which property will be owned.

Nor was the transaction void because *ultra vires*.

The law of New Jersey as declared by its courts is that an executed *ultra vires* transaction is not void. *Cam. & Atl. R. R. Co. v. May's Landing &c. R. R. Co.*, 48 N. J. L. 530, 567.

The place of the transaction in this case was New York, and the New York law is to the same effect as that of New Jersey—that an executed *ultra vires* transaction stands as valid. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Woodruff v. Erie Ry. Co.*, 93 N. Y. 609; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24; *Vought v. Eastern Bldg. &c. Assoc.*, 172 N. Y. 508.

In the Federal courts, with respect to the passing of title, the law is the same. See National Bank cases above referred to.

Even if the transaction in which the Oregon Short Line Railroad Company parted with the stock was void because illegal or *ultra vires*, nevertheless the complainants could not recover. *Equitable Life Assurance Society v. Wetherill*, 127 Fed. Rep. 947; *Smith v. Bean*, 15 N. H. 577; *Myers v. Meinrath*, 101 Massachusetts, 366; *Vandalia case*, 145 U. S. 393; *Higgins v. McCrea*, 116 U. S. 671; *White v. Barber*, 123 U. S. 392; *Horton v. Buffington*, 105 Massachusetts, 399.

The transaction has never been abandoned. The Securities Company claims the ownership which was thus acquired and proposes to exercise the rights of such ownership by distributing the stocks as surplus assets among its stockholders.

MR. CHIEF JUSTICE FULLER, after making the foregoing statement, delivered the opinion of the court.

In applying to this court for the writ of certiorari counsel for complainants insisted that the Circuit Court of Appeals had practically disposed of the entire controversy on the

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[287]merits, although its decree only reversed the order of the Circuit Court granting the preliminary injunction. We accepted that view and granted the writ, in the circumstances, notwithstanding the decree was not final. In our opinion the record presented the whole case to that court, in such wise, that it might properly have been finally disposed of in terms by its decree, in accordance with the well settled rule upon that subject. *Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U. S. 485, 495; *Castner v. Coffman*, 178 U. S. 168, 183; *Mayor &c. of Knoxville v. Africa*, 77 Fed. Rep. 501.

In *Western Union Telegraph Company v. Pennsylvania Railroad Company et al.*, 195 U. S. 540, 547, the Circuit Court had granted a preliminary injunction, 120 Fed. Rep. 981, which was reversed by the Circuit Court of Appeals. 123 Fed. Rep. 33. The telegraph company moved that the decree be modified so as to direct the dismissal of the bill. The motion was denied, and the telegraph company took an appeal to this court. Subsequently the Circuit Court *sua sponte* entered an order dismissing the bill, and the telegraph company appealed therefrom to the Circuit Court of Appeals. 195 U. S. 547. We then granted a certiorari, and, considering both appeals together, affirmed the decree of dismissal.

In the present case we granted the certiorari, at the instance of complainants, before the case had gone back to the Circuit Court, and shall do what the Circuit Court of Appeals might have done, that is, finally dispose of the case by our direction to the Circuit Court.

Complainants deny that the Securities Company became the owner of the Northern Pacific Railway shares, and assert to the contrary that the company held the shares as a trustee or a bailee for complainants.

And the principal ground on which this contention is rested is that it was so adjudicated by the Circuit Court for the District of Minnesota in the Government suit, by the decree of April 9, 1903, affirmed by this court.

It may be said in passing that complainants were not parties [288] of record to that suit, and that they were not parties by representation, if the effect of the transfers as between

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the parties thereto had been in issue and the vital conflict between complainants and the corporation, now set up, then existed, which would destroy the community of interest on which the rule of representation is founded. And, on the other hand, in that suit the Northern Securities Company, at a time when complainant Harriman was a director, answered that: "Every share of the Great Northern Company and the Northern Pacific Company acquired by this defendant has been, and, so long as it remains the property of the defendant, will continue to be, held and owned by it in its own right, and not under any agreement, promise, or understanding on its part, or on the part of its stockholders and officers, that the same shall be held, owned, or kept by it for any period of time whatever, or under any agreement that in any manner restricts or controls to any extent any use of the same which might lawfully be exercised by any other owner of said stocks."

But we are of opinion that the Circuit Court did not determine the quality of the transfer as between the defendants themselves, nor was that the purpose of the Government proceedings.

The decree of April 9, 1903, adjudged that defendants had theretofore entered into a combination or conspiracy in restraint of trade and commerce; that all stock of either of the railway companies then held or owned by the Securities Company was acquired and held in virtue of such combination; and enjoined the Securities Company and the two railway companies from receiving, or permitting the exercise of, any control by the Securities Company over either railway, or any exercise of the voting power of the railway shares, and the payment or reception of dividends upon the railway shares held by the Securities Company; and the Securities Company was forbidden from acquiring further stock of either of the railway companies.

And it was provided that nothing should be construed as [289] prohibiting the Securities Company from returning and transferring the railway shares to the original railway stockholders who had delivered their shares to the Securities Company for shares of its stock; or to such person or persons as might be the holders and owners of its own stock origin-

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ally issued in exchange or in payment for the stock claimed to have been acquired by it in the railway companies.

This did not involve a decision that any original vendor of the railway shares was entitled to a judicial restitution thereof, and such was the view of the Circuit Court itself, for in its opinion of April 19, 1904, the court said:

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential.

"In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to compel stockholders of the Securities Company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession, and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade.

"The Government was satisfied with the relief obtained, and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that [290] company would be able, and likewise disposed, to make a disposition of the stock which, under all the circumstances of the case, would be fair and just, and would restore it to the markets of the world, where it would have some value, instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested.

"It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for the stock in the two railway companies; but this provision was purely permissive. It did not command that the stock should be so returned, or exclude other methods of disposition of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the

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decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which had become final by affirmance, and make an [291] order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

The decree of April 9, 1903, was affirmed by the judgment of this court, which, of course, went no further than the decree itself. We did, indeed, by our judgment leave the Circuit Court at liberty "to proceed in the execution of its decree as the circumstances may require," but this did not operate to change the decree or import a power to do so not otherwise possessed.

Counsel argue, however, that certain expressions in the opinion of Mr. Justice Harlan so enlarged the scope of the decree as to give it the effect now attributed to it by complainants.

This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits. *Cohens v. Virginia*, 6 Wheat. 264, 399; *Carroll v. Carroll's Lessees*, 16 How. 275. But we do not think that the opinion of Mr. Justice Harlan is open to the construction put upon it. In speaking of the situation as between the Government and the defendants, the Securities Company is sometimes referred to as the custodian of the shares and sometimes as the absolute owner, but in the sense that in either view the combination was illegal. For the purposes of that suit it was enough that in any capacity the Securities Company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce.

Some of our number thought that as the Securities Company owned the stock the relief sought could not be granted, but the conclusion was that the possession of the power, which, if exercised, would prevent competition, brought the case within the statute, no matter what the tenure of title was.

[292] Treating the question as an open one, it seems to

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us indisputable that, as between these parties, the transaction was one of purchase and sale. The situation is thus well put by Dallas, J.:

"The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company was adopted by its board of directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was 'to purchase said stock * * * at an aggregate price of \$91,407,500, payable, as to \$82,491,871 thereof, in the fully paid-up and non-assessable shares of the capital stock of this company at par, and as to \$8,915,629, in cash.' It is obvious that this resolution contemplated a 'purchase,' and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company. The price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock, for which corporate certificates in the ordinary form were delivered and accepted. * * * The complainants received dividends upon the stock that was issued to them, which were paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock which it thereby pledged."

And the Securities Company sold 75,000 shares of its stock for \$7,522,000 cash, "used," as stated in the bill, "for the purchase of other property and for corporate purposes."

But assuming that the transaction was in form, and at least *prima facie* in substance, one of purchase and sale, it is denied that the equitable title vested because, as alleged in the second amended bill, there was an agreement by the promoters of the Securities Company, carried out by that [293] company, that the latter should "acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." And here again we concur in the views of the Circuit Court of Appeals as expressed by Judge Dallas.

"The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale; and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan & Co. to dispose of the

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Northern Pacific stock held by the Oregon Short Line Company, and that 'they further stated that, upon the organization of the proposed holding company,' not that it would take as custodian or trustee, but that 'they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line, and pay therefor in the stock of the holding company.' These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a custodian or depository. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which, by executed contract of purchase, it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and [294] to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and admittedly that payment was made."

Complainants' counsel say, in respect of Mr. Harriman's testimony that the transaction was an unconditional purchase and sale, that he only swore to his opinion on a question of law. This will hardly do when applied to testimony as to what was said and done in conference with the alleged promoters of the Securities Company. When Mr. Harriman testified that he attached to his negotiations in the sale of Northern Pacific stock no other condition than that of the price, and that the transaction was completed, how can complainants be permitted to deny that this was a statement of fact? And how can the establishment of the contract and its terms as embodied in the resolutions of November 15, 1901, approved at the succeeding meeting by the vote of Mr. Harriman, and which appeared to be, and were testified to by Mr. Hill, President of the Securities Company, as constituting the only contract which was made and authorized, be overthrown in the absence of any evidence to the contrary?

The consideration received by complainants consisted of money and Northern Securities stock certificates. Those certificates were in common form, and each was a muniment of the holder's title to a proportionate interest in the corporate estate vested in the corporation. By the provisions of the corporation act of New Jersey, and its certificate of incorporation and distribute its assets. Complainants sub- and to hold, and at any time to sell, the shares of other corpo-

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rations. And under that act it had power, in the discretion of its directors and of the holders of two-thirds of its capital stock, at any time, on notice, to dissolve and to wind up the corporation and distribute its assets. Complainants subjected themselves to this power in accepting the shares of the [295] Northern Securities Company, and their unqualified transfer of their railway stock was inconsistent with any obligation of the Securities Company to retain the railway shares for any particular period.

In acquiring the Securities stock, complainants acquired the ordinary rights of stockholders in New Jersey business corporations, including the right to receive dividends, and to share in the distribution of the assets of the corporation on its dissolution, or of any surplus of assets on reduction of its capital stock. In view of the decree of the Circuit Court for the District of Minnesota in the Government's suit the continued ownership of the railway shares became useless to the stockholders of the Securities Company, and accordingly the directors decided to reduce the capital stock and distribute the surplus of assets created by that reduction, and the resolutions to that end were ratified by a vote of more than two-thirds of the Securities shares.

By the transfer of the Northern Pacific shares and the payment therefor as agreed the contract was executed, and the implied obligations resulting from the relation of corporation and stockholder alone remained executory. And when the Securities Company resolved to distribute these railway shares ratably among all its stockholders, it did this in performance of its contract with them and not in repudiation of it. It is the complainants who are seeking the determination and repudiation of the contract. Their final contention in that regard is that they are entitled to a decree rescinding the contract of purchase and sale, and directing the return of the railway shares parted with by them thereunder, because of the illegality of the transaction as adjudged in the Federal courts.

And this in defiance of the settled rule that property delivered under an illegal contract cannot be recovered back by any party *in pari delicto*. "The general rule, in equity, as at law," said Mr. Justice Gray in *St. Louis, Vandalia &*

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Terre Haute Railroad Company v. Terre Haute & Indianapolis [296] Railroad Company, 145 U. S. 393, "is *In pari delicto potior est conditio defendantis*; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party, and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall. 349, 355; *Spring Co. v. Knowlton*, 103 U. S. 49; Story Eq. Jur. § 298. * * *

"When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, *supra*; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 284."

That was a suit in equity by the maker of an unauthorized lease of a railway and franchises, against the lessee, to enforce an attempted repudiation of the lease by the former, on the ground of the illegality. The lease was for nine hundred and ninety-nine years, of which but a few years had elapsed at the date of the attempted rescission.

The illegality of the lease and the consequent breach of public duty were manifest, but the right of the lessor, therefore, to maintain the suit was denied by this court.

In the present case complainants seek the return of property delivered to the Securities Company pursuant to an executed contract of sale on the ground of the illegality of that contract, but the record discloses no special considerations of equity, justice or public policy, which would justify the courts in relaxing the rigor of the rule which bars a recovery.

The Circuit Court decrees put at rest any question that the [297] ratable distribution resolved upon was in violation of public policy.

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And it is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock and a ratable distribution of the remaining assets to the other Securities stockholders would not only be in itself inequitable, but would directly contravene the object of the Sherman Law and the purposes of the Government suit.

The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition.

While the superior equities, as against complainants' present claim, of the many holders of Securities shares who purchased in reliance on the belief that they thereby acquired a ratable interest in all of the assets of the Securities Company, are too plain to be ignored.

The illegal contract could not be made legal by estoppel, but the ownership of the assets, unaffected by a special interest in complainants, could be placed beyond dispute on their part by their conduct in holding the Securities Company out to the world as unconditional owner.

And, without repeating in detail what has been already set out, it is plain that right of rescission of the executed contract of November 18, 1901, even if rescission could have otherwise been sustained, had been lost by acquiescence and laches at the time this bill was filed.

Since the transfer of that date Securities stock had passed into the hands of more than 2,500 holders, many of them in Great Britain, France and other parts of Europe; nearly a year after the filing of the Government bill 75,000 shares were sold for cash, complainant Harriman concurring; some months after, Harriman and Pierce and the Oregon Short Line Company pledged their 824,000 shares to the Equitable Trust Company; notwithstanding the decree of April 9, 1903, they [298] stood upon their rights as shareholders; and it was not until after March 22, 1904, when defendant's board of directors resolved upon a ratable distribution that complainants undertook to change an election already so pronounced as to be irrevocable in itself in view of the rights of others.

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We regard the contention that complainants are exempt from the doctrine *in pari delicto* because the parties acted in good faith and without intention to violate the law as without merit. With knowledge of the facts and of the statute, the parties turned out to be mistaken in supposing that the statute would not be held applicable to the facts. Neither can plead ignorance of the law as against the other, and defendant secured no unfair advantage in retaining the consideration voluntarily delivered for the price agreed.

Perhaps it should be noticed that the bill sought the return of two parcels of Northern Pacific common stock, the 370,230 shares delivered to the Securities Company, November 18, 1901, and the 347,090 shares received December 27, 1901, from the Northern Pacific Company on the retirement of preferred stock.

Early in 1901 the Hill-Morgan party held a majority of the common stock, and had asserted the intention to retire the preferred stock, "without," as Mr. Harriman testified, "affording the holders of the preferred stock the right to participate in any new securities that might be issued."

With full knowledge of that intention the proceedings of the two companies followed in November, 1901, and the absolute and unconditional sale and purchase, as we hold the transaction to have been.

We find no evidence of any express agreement that complainants should be entitled to the new common stock, and it was certainly not the natural increase of the old stock, but the result of the exercise of the right of subscription. The purchase by the Securities Company was on its own account and not in trust, and cannot be disturbed because of illegal purpose at the clamor of parties *in pari delicto*. And there is [299] here no offer of the restoration of the *status quo*, if that were practicable.

Doubtless it became the duty of the Securities Company to end a situation that had been adjudged unlawful, and this could be effected by sale and distribution in cash, or by distribution in kind, and the latter method was adopted, and wisely adopted, as we think, for the forced sale of several hundred millions of stock would have manifestly involved disastrous results.

Syllabus.

In fine, the title to these stocks having intentionally been passed, the former owners or part of them cannot reclaim the specific shares and must be content with their ratable proportion of the corporate assets.

Decree affirmed; cause remanded to Circuit Court with a direction to dismiss the bill.

[236] BOARD OF TRADE OF THE CITY OF CHICAGO v. CHRISTIE GRAIN AND STOCK COMPANY.^a

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

L. A. KINSEY COMPANY v. BOARD OF TRADE OF THE CITY OF CHICAGO.^b

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Nos. 224, 280. Argued April 20, 24, 25, 1905.—Decided May 8, 1905.

[198 U. S., 236.]

The Chicago Board of Trade collects at its own expense quotations of prices offered and accepted for wheat, corn and provisions in its exchange and distributes them under contract to persons approved by it and under certain conditions. In a suit brought by it to restrain parties from using the quotations obtained and used with-

^a In the Christie case an injunction was granted by the Circuit Court of the United States for the Western District of Missouri, July 5, 1902 (116 Fed., 944), but it was not based in any way upon the anti-trust law, and therefore the decision is not reprinted. On final hearing, March 19, 1903, the court considered the matter from the standpoint of the anti-trust law and adhered to its original conclusions (121 Fed., 608). See p. 233. The decree was reversed by the Circuit Court of Appeals, Eighth Circuit (125 Fed., 161) but not upon any ground related to the antitrust law. That decision not reprinted. The action of the Circuit Court of Appeals was reversed by the Supreme Court, and the injunction was allowed (198 U. S., 236).

^b In the Kinsey case an injunction was denied the board of trade by the Circuit Court for the District of Indiana, July 14, 1903 (125 Fed., 72). The decree was reversed by the Circuit Court of Appeals, Seventh Circuit, April 12, 1904, with direction to enter a decree in appellant's favor (130 Fed., 507). Antitrust law not discussed by either court. Those decisions not reprinted. Affirmed by the Supreme Court (198 U. S., 236).

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out authority of the Board, defendants contended that as the Board of Trade permitted, and the quotations related to, transactions for the pretended buying of grain without any intention of actually receiving, delivering or paying for the same, that the Board violated the Illinois bucket shop statute and there were no property rights in the quotations which the court could protect, and that the giving out of the quotations to certain persons makes them free to all. *Held*, that

Even if such pretended buying and selling is permitted by the Board of Trade it is entitled to have its collection of quotations protected by the law, and to keep the work which it has done to itself, nor does it lose its property rights in the quotations by communicating them to certain persons, even though many, in confidential and contractual relations [237] to itself, and strangers to the trust may be restrained from obtaining and using the quotations by including a breach of the trust.^a

A collection of information, otherwise entitled to protection, does not cease to be so because it concerns illegal acts, and statistics of crime are property to the same extent as other statistics, even if collected by a criminal who furnishes some of the data.

Contracts under which the Board of Trade furnishes telegraph companies with its quotations, which it could refrain from communicating at all, on condition that they will only be distributed to persons in contractual relations with, and approved by, the Board, and not to what are known as bucket shops, are not void and against public policy as being in restraint of trade either at common law or under the Anti-Trust Act of July 2, 1890.

THE facts are stated in the opinion.

Mr. Henry S. Robbins for petitioner in No. 224 and respondent in No. 280:

It is not a good defense to these suits that most of the transactions, out of which the quotations arise are gambling transactions. The violation by a plaintiff of a criminal statute of one State does not debar him from maintaining suits to protect his property in a Federal court in another State. Penal laws do not reach, in their effect, beyond the jurisdiction of where they were established. *Commonwealth v. Green*, 7 Massachusetts, 50, 674; *Logan v. United States*, 144 U. S. 263, 303; *State v. Pelican Ins. Co.*, 127 U. S. 265, 289; *The Antelope*, 10 Wheat. 66, 123; *Folliott v. Ogden*, 1 H. Blacks. 123, 135; *Fuller v. Berger*, 120 Fed. Rep. 274. And see also *City of Chicago v. Stock Yards*, 164 Illinois, 224, 238; *Bateman v. Fargason*, 4 Fed. Rep. 32; *Ansley v. Wil-*

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son, 50 Georgia, 421; *Langdon v. Templeton*, 66 Vermont, 173; 1 Pom. Eq. § 399.

Petitioner's misconduct, if any, respecting the transactions upon its exchange, prejudicially affects these respondents only as it does the public at large.

The general dissemination of these quotations is conceded to be highly beneficial to legitimate commerce. Respondents' answer so admits. So the Illinois Supreme Court has also held. *Stock Exchange v. Board of Trade*, 127 Illinois, 153.

[238] The Board of Trade's conduct with respect to the quotations, is not at all reprehensible. It gives them to all persons desiring them for lawful purposes, and only withholds them, as it lawfully may, from bucket shops.

As to the Illinois bucket shop law, see *Soby v. People*, 134 Illinois, 66. It does not apply to exchanges.

Market news, whose dissemination is helpful to commerce, is not to be deemed infected with illegality or beyond judicial protection, because the owner of this news maintains an exchange, where parties to most of the *transactions* it records do not contemplate actual delivery. The existence of a property right in news depends upon its source, rather than the character or utility of the news itself. *Brooks v. Martin*, 2 Wall. 79; *Planters' Bank v. Union Bank*, 16 Wall. 483, 499.

As matter of fact it is not true that most of the trades, whose prices these quotations record, are gambling transactions.

As to the principle and legality of the systems of offsetting or elimination of trades which will be found in most commercial exchanges, see *Clews v. Jamieson*, 182 U. S. 461; *Lehman v. Feld*, 37 Fed. Rep. 852; *Irwin v. Wilbur*, 110 U. S. 499; *Bibb v. Allen*, 110 U. S. 500.

The Board of Trade should not be held responsible for what gambling there is upon its exchange, and on that account be deprived of its right to sue to protect its property in its quotations.

There is a property right in the quotations which equity will protect by injunction.

Both in England and this country market news thus distributed as are these quotations, is a species of property,

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which a court of equity will protect by injunction. *Exchange Tel. Co. v. Gregory*, L. R. (1896), 1 Q. B. 147; *Dodge Co. v. Construction Co.*, 183 Massachusetts, 62; *Kiernan v. Manhattan Tel. Co.*, 50 How. Pr. 194; *Nat. Tel. News Co. v. West. Un. Tel. Co.*, 119 Fed. Rep. 294; *Illinois Com. Co. v. Cleveland Tel. Co.*, 119 Fed. Rep. 301; *Cleveland Tel. Co. v. Stone*, 105 [239] Fed. Rep. 594; *Board of Trade v. Hadden-Krull Co.*, 103 Fed. Rep. 902; *S. C.*, 109 Fed. Rep. 705; this case below 116 Fed. Rep. 944.

Board of Trade quotations are a species of property. *Stock Exchange v. Board of Trade*, 127 Illinois, 153.

That this market news is too evanescent to derive any protection from the Copyright Act, a perusal of that statute will show. *Nat. Tel. News Co. v. West. Un. Tel. Co.*, *supra*; *Clayton v. Stone*, 2 Payne, 382; *S. C.*, Fed. Cas. 2872.

As to the protection of literary property, apart from the statutory provisions of copyright law, see *Millar v. Taylor*, 4 Burr, 2303; *Donaldson v. Becket*, 4 Burr, 2408; *Wheaton v. Peters*, 8 Pet. 591; *Holmes v. Hurst*, 174 U. S. 82; *Tompkins v. Halleck*, 133 Massachusetts, 32; *Palmer v. DeWitt*, 47 N. Y. 532. See other cases applying the same principle to dramas, exhibition of paintings, etc. *Macklin v. Richardson*, Ambl. 694; *Crowe v. Aiken*, 2 Biss. 208; *S. C.*, Fed. Cas. No. 3441; *Albert v. Strange*, 2 DeG. S. & M. 652; *Turner v. Robinson*, 10 Irish Ch. 121. And in the case of lectures. *Abernethy v. Hutchinson*, 1 Hall. & Tw. 28; *Caird v. Simes*, L. R. (1887) 12 H. L. 326. See also *Bartlette v. Chittenden*, 4 McLean, 300; *S. C.*, Fed. Cas. No. 1082.

The contracts between the Board of Trade and the telegraph companies are not illegal and are not in restraint of trade under the common law or any state or Federal statute, and as to duty of the Board to give out the quotations see *Stock Exchange v. Board of Trade*, 127 Illinois, 153; and *contra*, *Ladd v. F. C. P. & M. Co.*, 53 Texas, 172; *Delaware R. R. Co. v. Central Co.*, 45 N. J. Eq. 50; *State v. Ass'd Press*, 159 Missouri, 424; *Re Renville*, 46 App. Div. N. Y. 37; *Central Exch. v. Board of Trade*, 196 Illinois, 396; *Smith v. West. Un. Tel. Co.*, 84 Kentucky, 664; *Bryant v. West. Un. Tel. Co.*, 17 Fed. Rep. 825; *Bradley v. West. Un. Tel. Co.*, 9 Con. Law Bull. 223; 27 Am. & Eng. Ency. of Law, 2d ed.,

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1039, 1094; Gray on Telegraphs, 19; Rev. Stat. Missouri, 1889, § 2338; Bucket Shop Statute of Illinois; *State v. Bell Tel. Co.*, 23 Fed. Rep. [240] 539; *Am. Tel. Co., v. Conn. Tel. Co.*, 49 Connecticut, 352; *Sullivan v. Post. Tel. Co.*, 123 Fed. Rep. 411; *Wilson v. N. Y. Comm. Tel. Co.*, 3 N. Y. Supp. 633. Nor is it a violation of the Sherman Act, or illegal at common law to impose restrictions as to use of quotations. *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 454; *Mitchell v. Reynolds*, 1 Poere Williams, 181; *Elliman v. Carrington*, L. R. 1901, 2 Ch. Div. 275; *Fowle v. Park*, 131 U. S. 88; *Bement v. Nat. Harrow Co.*, 186 U. S. 70; *United States v. E. C. Knight Co.*, 156 U. S. 1, 16; *Northern Securities Co. v. United States*, 193 U. S. 197, 338; *Hopkins v. United States*, 171 U. S. 578, 600; *Anderson v. United States*, 171 U. S. 604, 615; *United States v. Joint Traffic Association*, 171 U. S. 558; *Alexander v. State*, 86 Georgia, 246.

The anti-bucket shop acts were in force when the Sherman Act was passed. They promote public welfare. They were passed in the exercise of the State's police power. Doubtless that power must yield, when necessary, to the paramount power of Congress to regulate commerce; but this court should not, in the absence of clear language, assume that Congress intended by this act to nullify these state statutes, if indeed it lawfully might do so. *Sherlock v. Alling*, 93 U. S. 99; *Plumley v. Massachusetts*, 155 U. S. 461; *Patterson v. Kentucky*, 97 U. S. 501; *Nashville Ry. v. Alabama*, 128 U. S. 96; *Hennington v. Georgia*, 163 U. S. 299.

Is it not a more reasonable construction of this act that Congress did not intend to cover this subject or invade this field at all, and that States may still, under their police power, prevent the transmission of quotations into a State for use there in a bucket shop?

Mr. James H. Harkless and *Mr. W. H. Rossington*, with whom *Mr. Chester H. Crum*, *Mr. Charles S. Crysler*, *Mr. Clifford Histed*, *Mr. Charles Blood Smith* and *Mr. J. S. West* were on the brief, for respondent in No. 244.

Mr. Lloyd Charles Whitman and *Mr. E. D. Crumpacker*, with whom *Mr. Jacob J. Kern*, *Mr. John A. Brown* and

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[241] *Mr. Peter Crumpacker* were on the brief, for the petitioner in No. 280:

The quotations are not property and cannot be impressed with a right of property by the Board of Trade. *Sayre v. Moore*, 1 East. Rep. 361; *Jefferys v. Boosey*, 4 H. L. Cas. 815; *Crowe v. Aiken*, 2 Bissell, 214; *Thompson v. Hubbard*, 131 U. S. 151; *Iolanthe Case*, 15 Fed. Rep. 442; *West. Pub. Co. v. Lawyers Coö. Co.*, 64 Fed. Rep. 364; *Stowe v. Thomas*, Fed. Cas. No. 13514, and cases cited by counsel for Board of Trade.

The Board of Trade has no property right or interest in or to the knowledge of the quotations, as they arise from the transactions of its members on the exchange. Cases cited *supra* and *Keene v. Wheatley*, Fed. Cas. No. 7644.

The right of property to mental or literary effort rests fundamentally upon the creative faculty which must have been exercised by the claimant or one through whom his title is derived.

Nothing can be the object of property which has not a corporeal substance. *Wheaton v. Peters*, 8 Pet. 591; nor be the object of property which is not capable of sole and exclusive enjoyment. *Millar v. Taylor*, 4 Burr, 2361; 2 Kent's Com. 320; Webster; Bouvier, sub. "Property"; Shouler's Personal Property, § 2; 1 Blackstone, 138; *Jones v. Van Zandt*, 4 McLean, 603. To be property it must be capable of distinguishable proprietary marks. *Jefferys v. Boosey*, 4 H. L. Cas. 869. The Board of Trade cannot alter the essential nature of the quotations. Its sole right of property is confined to the records themselves.

It has no property interest in quotations made up of transactions on its floor when the transactions are not based upon *bona fide* contracts of purchase and sale of the commodity dealt in. The cases in 127 Illinois and 103, 109 and 119 Fed. Rep., cited by counsel for the Board, are not determinative of this case.

The transactions on which the quotations are based are so [242] tainted with illegality that the Board cannot have a property right in them.

As to the illegality of transactions, where there is no inten-

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tion of delivery of the commodity bought and sold, see *Counselman v. Reichert*, 103 Iowa, 430; *First Nat. Bank v. Oskaloosa Co.*, 66 Iowa, 41. As to methods of the Board of Trade see *Central Stock Exchange v. Board of Trade*, 196 Illinois, 396; *Higgins v. McCrea*, 116 U. S. 671. The testimony shows that no deliveries are intended in ninety-five per cent of the transactions. The members of the Board occupy the relation of bucket shops to their customers and the Board is a bucket shop to the non-members. As to substitution of trade see *Clews v. Jamieson*, 182 U. S. 461, 471.

As to how transactions between members are to be determined as to the element of wager see *Irwin v. Williar*, 110 U. S. 499; *Melchert v. Am. Union Tel. Co.*, 11 Fed. Rep. 193; *Bernard v. Backhaus*, 9 N. W. Rep. 585, 596; *Dows v. Gaspel*, 60 N. W. Rep. 60; *Whitesides v. Hunt*, 97 Indiana, 191; *Edwards v. Hoeffinghoff*, 38 Fed. Rep. 639; *Embrey v. Jamieson*, 131 U. S. 336; *Mohr v. Miseni*, 49 N. W. Rep. 862; *Pickering v. Chase*, 79 Illinois, 328.

The Board of Trade does not come into court with clean hands. It is violating the Illinois anti-bucket shop act of 1887. 1 Starr & Curtis Ann. Stat. 1304. That act was construed in *Soby v. People*, 134 Illinois, 68; *Weare Commission Company v. People*, 111 Ill. App. 116, affirmed 209 Illinois, 528. And see as to the protection of gambling transactions. *Beard v. Milmine*, 88 Fed. Rep. 868; *Schultze v. Holtz*, 82 Fed. Rep. 448.

The court will not protect trade-marks used to deceive the public or if the owner cannot otherwise come into court with clean hands. *Lawrence Co. v. Tennessee Co.*, 31 Fed. Rep. 776, 784; *Krauss v. Pebbles*, 58 Fed. Rep. 585, 594; *Simonds v. Jones*, 82 Maine, 302; *Joseph v. Macowsky*, 96 California, 518; *Holman v. Johnson*, Cowp. 341; *Pettridge v. Wells*, 4 Abb. Pr. 144; *Hall v. Coppell*, 7 Wall. 542, 599.

[243] The Board cannot restrict the publication; if it publishes the quotations it must publish for all. *Ladd v. Oxnard*, 75 Fed. Rept. 703; *Gottsberger v. Aldine Book Co.*, 33 Fed. Rep. 381; *Keene v. Wheatley*, Fed. Cas. No. 7644.

The Board realizes the full avails of its property when it sells the quotations to the telegraph companies and the de-

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livery to those companies is necessarily a publication to the world. *Bryant v. West. Un. Tel. Co.*, 17 Fed. Rep. 825, is not applicable; the distinction between restricted and general publication does not extend to matter of this kind. *Pierce & Bushnell v. Werckmeister*, 18 C. C. A. 431; *Tribune v. Ass'd Press*, 116 Fed. Rep. 126.

Assuming there ever was a right of property in the Board to these quotations they have by usage become impressed with a public use and the Board is estopped from discriminating with reference to such use. *Exchange v. Board of Trade*, 127 Illinois, 153; *Commission Co. v. Live Stock Exchange*, 143 Illinois, 239; *Board of Trade v. Central Exchange*, 196 Illinois, 396; *Munn v. Illinois*, 94 U. S. 126, and Rose's notes thereto; *State v. Gas Co.*, 34 Ohio St. 572; *Lindsey v. Anniston*, 104 Alabama, 261; *People v. King*, 110 N. Y. 418; *Rushville v. Gas Co.*, 132 Indiana, 575; *Zanesville v. Gas Co.*, 47 Ohio St. 1; *White v. Canal Co.*, 22 Colorado, 198; *Water Works Co. v. Schotter*, 110 U. S. 347; *Railroad Co. v. Wilson*, 132 Indiana, 517; *B. & O. Tel. Co. v. Bell Telephone Co.*, 23 Fed. Rep. 539; *Cotting v. Stock Yards Co.*, 183 U. S. 79. The conditions exacted of the public in the contract with the telegraph companies are unreasonable and tend to create a monopoly. *Kalamazoo &c. Co. v. Sootsma*, 84 Michigan, 194; *Railroad Co. v. Langlois*, 24 Pac. Rep. 209; *Lindsey v. Anniston*, 104 Alabama, 261; *Lough v. Outerbridge*, 113 N. Y. 277; *Railroad Co. v. Bowling Green*, 57 Ohio St. 345. Such contracts also violate the Sherman Anti-Trust Act. *Carter-Crume Co. v. Peurrung*, 86 Fed. Rep. 439. The business of telegraphing these quotations is interstate commerce. *Pensacola Tel. Co. v. West. Un. Tel. Co.*, 96 U. S. 1; *West. Un. Tel. Co. v. Texas*, [244] 105 U. S. 460; *West. Un. Tel. Co. v. Pendleton*, 122 U. S. 347; *Addyston Pipe Case*, 175 U. S. 241; *Gibbons v. Ogden*, 9 Wheat. 1, 189, 210; *Brown v. Maryland*, 12 Wheat. 447; *Mobile v. Kimball*, 102 U. S. 691; *Bowman v. Chicago R. R. Co.*, 125 U. S. 490; *Ferry Co. v. Pennsylvania*, 114 U. S. 203; *Hopkins v. United States*, 171 U. S. 578, 590.

Mr. Julien T. Davies, Mr. Abram I. Elkus and Mr. Garrard Glenn by leave of the court, submitted a brief in behalf

Argument for Edwin Hawley and Frank H. Ray.

of Edwin Hawley and Frank H. Ray, solely on the nature of a wagering contract.

Contracts for purchase and sale of a commodity, not to be delivered but only to be performed by advancing and paying differences, are void at common law in the absence of statute. *Irwin v. Williar*, 110 U. S. 499; *Ball v. Davis*, 1 N. Y. St. Rep. 517; *Flagg v. Gilpin*, 17 R. L. Ired. 1, 10; *Rumsey v. Berry*, 65 Maine, 575; *Gregory v. Wendell*, 39 Michigan, 337; *Mohr v. Meisen*, 47 Minnesota, 228; *Brua's Appeal*, 55 Pa. St. 294; *Cunningham v. Bank*, 71 Georgia, 400; *Cothran v. Ellis*, 125 Illinois, 496.

The form of the contract is immaterial and the test is the actual intent of the parties at the time of making the contract. *Irwin v. Williar*, 110 U. S. 499; *Higgins v. McCrea*, 116 U. S. 671; *Embrey v. Jemison*, 131 U. S. 336; *Pierce v. Rice*, 142 U. S. 28; *Story v. Salomon*, 71 N. Y. 420; *Peck v. Doran-Wright Co.*, 57 Hun. 343; *Kenyon v. Luther*, 4 N. Y. Supp. 498; *Cover v. Smith*, 82 Maryland, 586; *Lester v. Buel*, 49 Ohio St. 240; *Rumsey v. Berry*, 65 Maine, 570; *Gregory v. Wendell*, 39 Michigan, 337; *Flagg v. Baldwin*, 38 N. J. Eq. 219; *Sharp v. Stalker*, 63 N. J. Eq. 596.

This intent may be proven by the circumstances surrounding the transactions and such proof is received with great liberality. *Kenyon v. Luther*, 4. N. Y. Supp. 498; *Ball v. Davis*, 1 N. Y. St. Rep. 517; *Dwight v. Badgely*, 60 Hun, 144; *Peck v. Doran-Wright Co.*, 57 Hun, 343; *Yerkes v. Salomon*, 11 Hun, 471; *Mackey v. Rausch*, 39 N. Y. St. Rep. 232; *In re [245] Green*, Fed. Cas. No. 5751; *Cobb v. Prell*, 15 Fed. Rep. 774; *In re Chandler*, Fed. Cas. No. 2590; *Mohr v. Meisen*, 47 Minnesota, 228; *Kirkpatrick v. Bonsall*, 57 Pa. St. 155; *Lowrey v. Dillmann*, 59 Wisconsin, 197; *Carroll v. Holmes*, 24 Ill. App. 453; *Hill v. Johnson*, 38 Mo. App. 383; *Croner v. Spencer*, 92 Missouri, 499; *Cothran v. Ellis*, 125 Illinois, 496.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are two bills in equity brought by the Chicago Board of Trade to enjoin the principal defendants from using and distributing the continuous quotations of prices on sales of grain and provisions for future delivery, which are collected

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by the plaintiff and which cannot be obtained by the defendants except through a known breach of the confidential terms on which the plaintiff communicates them. It is sufficient for the purposes of decision to state the facts without reciting the pleadings in detail. The plaintiff was incorporated by special charter of the State of Illinois on February 18, 1859. The charter incorporated an existing board of trade, and there seems to be no reason to doubt, as indeed is alleged by the Christie Grain and Stock Company, that it then managed its Chamber of Commerce substantially as it has since. The main feature of its management is that it maintains an exchange hall for the exclusive use of its members, which now has become one of the great grain and provision markets of the world. Three separate portions of this hall are known respectively as the Wheat Pit, the Corn Pit, and the Provision Pit. In these pits the members make sales and purchases exclusively for future delivery, the members dealing always as principals between themselves, and being bound practically, at least, as principals to those who employ them when they are not acting on their own behalf.

The quotation of the prices continuously offered and accepted in these pits during business hours are collected at the plaintiff's expense and handed to the telegraph companies, which have their instruments close at hand, and by the latter are sent to a great number of offices. The telegraph companies all receive the quotations under a contract not to furnish them to any bucket shop or place where they are used as a basis for bets or illegal contracts. To that end they agree to submit applications to the Board of Trade for investigation, and to require the applicant, if satisfactory, to make a contract with the telegraph company and the Board of Trade, which, if observed, confines the information within a circle of persons all contracting with the Board of Trade. The principal defendants get and publish these quotations in some way not disclosed. It is said not to be proved that they get them wrongfully, even if the plaintiff has the rights which it claims. But as the defendants do not get them from the telegraph companies authorized to distribute them, have declined to sign the above-mentioned contracts, and deny the plaintiff's rights

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altogether, it is a reasonable conclusion that they get, and intend to get, their knowledge in a way which is wrongful unless their contention is maintained.

It is alleged in the bills that the principal defendants keep bucket shops, and the plaintiff's proof on that point fails, except so far as their refusal to sign the usual contracts may lead to an inference, but if the plaintiff has the rights which it alleges the failure is immaterial. The main defense is this. It is said that the plaintiff itself keeps the greatest of bucket shops, in the sense of an Illinois statute of June 6, 1887, that is, places wherein is permitted the pretended buying and selling of grain, etc., without any intention of receiving and paying for the property so bought, or of delivering the property so sold. On this ground it is contended that if under other circumstances there could be property in the quotations, which hardly is admitted, the subject matter is so infected with the plaintiff's own illegal conduct that it is *caput lupinum*, and may be carried off by any one at will.

It appears that in not less than three-quarters of the transactions in the grain pit there is no physical handing over of [247] any grain, but that there is a settlement, either by the direct method, so called, or by what is known as ringing up. The direct method consists simply in setting off contracts to buy wheat of a certain amount at a certain time, against contracts to sell a like amount at the same time, and paying the difference of price in cash, at the end of the business day. The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A has sold to B five thousand bushels of May wheat, and B has sold the same amount to C, and C to D and D to A. Substituting D for B by novation, A's sale can be set against his purchase, on simply paying the difference in price. The Circuit Court of Appeals for the Eighth Circuit took the defendant's view of these facts and ordered the bill to be dismissed. 125 Fed. Rep. 161. The Circuit Court of Appeals for the Seventh Circuit declined to follow this decision and granted an injunction as prayed. 130 Fed. Rep. 507. Thereupon writs

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of certiorari were granted by this Court and both cases are here.

As has appeared, the plaintiff's chamber of commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be [248] touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain. This court has upheld sales of stock for future delivery and the substitution of parties provided for by the rules of the Chicago Stock Exchange. *Clews v. Jamieson*, 182 U. S. 461.

When the Chicago Board of Trade was incorporated we cannot doubt that it was expected to afford a market for future as well as present sales, with the necessary incidents of such a market, and while the State of Illinois allows that charter to stand, we cannot believe that the pits, merely as places where future sales are made, are forbidden by the law. But again, the contracts made in the pits are contracts between the members. We must suppose that from the beginning as now, if a member had a contract with another member to buy a certain amount of wheat at a certain time and another to sell the same amount at the same time, it would be deemed unnecessary to exchange warehouse receipts. We must suppose that then as now, a settlement would be made by the payment of differences, after the analogy of a clearing house. This naturally would take place no less that the

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contracts were made in good faith for actual delivery, since the result of actual delivery would be to leave the parties just where they were before. Set-off has all the effects of delivery. The ring settlement is simply a more complex case of the same kind. These settlements would be frequent, as the number of persons buying and selling was comparatively small.

The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties, and if the parties know when they make such contracts that they are very likely to have a chance to satisfy them in that way and intend to make use of it, that fact is perfectly consistent with a serious business purpose and an intent that the contract shall mean what it says. There is no doubt, from the rules of the Board of Trade or the evidence, [249] that the contracts made between the members are intended and supposed to be binding in manner and form as they are made. There is no doubt that a large part of those contracts is made for serious business purposes. Hedging, for instance, as it is called, is a means by which collectors and exporters of grain or other products, and manufacturers who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale, as the case may be, of an equal quantity of the product, or of the material of manufacture. It is none the less a serious business contract for a legitimate and useful purpose that it may be offset before the time of delivery in case delivery should not be needed or desired.

Purchases made with the understanding that the contract will be settled by paying the difference between the contract and the market price at a certain time, *Embrey v. Jemison*, 131 U. S. 336, *Weare Commission Co. v. People*, 209 Illinois, 528, stand on different ground from purchases made merely with the expectation that they will be satisfied by set-off. If the latter might fall within the statute of Illinois, we would not be the first to decide that they did when the object was self-protection in business and not merely a speculation entered into for its own sake. It seems to us an extraordinary and unlikely proposition that the dealings which give

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its character to the great market for future sales in this country are to be regarded as mere wagers or as "pretended" buying or selling, without any intention of receiving and paying for the property bought, or of delivering the property sold, within the meaning of the Illinois act. Such a view seems to us hardly consistent with the admitted fact that the quotations of prices from the market are of the utmost importance to the business world, and not least to the farmers; so important indeed, that it is argued here and has been held in Illinois that the quotations are clothed with a public use. It seems to us hardly consistent with the obvious purposes of the plaintiff's charter, or indeed with the words of the statute invoked. The [250] sales in the pits are not pretended, but, as we have said, are meant and supposed to be binding. A set-off is in legal effect a delivery. We speak only of the contracts made in the pits, because in them the members are principals. The subsidiary rights of their employers where the members buy as brokers we think it unnecessary to discuss.

In the view which we take, the proportion of the dealings in the pit which are settled in this way throws no light on the question of the proportion of serious dealings for legitimate business purposes to those which fairly can be classed as wagers or pretended contracts. No more does the fact that the contracts thus disposed of call for many times the total receipts of grain in Chicago. The fact that they can be and are set-off sufficiently explains the possibility, which is no more wonderful than the enormous disproportion between the currency of the country and contracts for the payment of money, many of which in like manner are set off in clearing houses without any one dreaming that they are not paid, and for the rest of which the same money suffices in succession, the less being needed the more rapid the circulation is.

But suppose that the Board of Trade does keep a place where pretended and unlawful buying and selling are permitted, which as yet the Supreme Court of Illinois, we believe, has been careful not to intimate, it does not follow that it should not be protected in this suit. The question whether it should be involved several elements which we shall take up in turn.

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In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. Compare *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 249, 250. The plaintiff does not lose its rights by communicating the results to persons, even if many, in confidential relations [251] to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach. *Exchange Telegraph Co. v. Gregory & Co.*, [1896] 1 Q. B. D. 147; *F. W. Dodge Co. v. Construction Information Co.*, 183 Massachusetts, 62; *Board of Trade v. C. B. Thomson Commission Co.*, 103 Fed. Rep. 902; *Board of Trade v. Hadden-Krull Co.*, 109 Fed. Rep. 705; *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. Rep. 294; *Illinois Commission Co. v. Cleveland Tel. Co.*, 119 Fed. Rep. 301.

The publications insisted on in some of the arguments were publications in breach of contract, and do not affect the plaintiff's rights. Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward. A priority of a few minutes probably is enough.

If then the plaintiff's collection of information is otherwise entitled to protection, it does not cease to be so, even if it is information concerning illegal acts. The statistics of crime are property to the same extent as any other statistics, even if collected by a criminal who furnishes some of the data. The Supreme Court of Illinois has recognized in the fullest terms the value and necessity of the knowledge which the plaintiffs control. It must have known, even if it did not have the evidence before it, as to which we cannot tell from the report, what was the course of dealing on the exchange. Yet it was so far from suggesting that the plaintiff's work was unmeritorious that it held it clothed with a public use.

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New York & Chicago Grain & Stock Exchange v. Board of Trade, 127 Illinois, 153.

The defendants lay hold of the declaration in the case last cited and say, with doubtful consistency, that this information is of such importance that it is clothed with a public use, and that, therefore, they are entitled to get and use it. In the case referred to it was held that the plaintiff, which had been re- [252] ceiving the continuous quotations, was entitled still to receive them on paying for them and submitting to all reasonable requirements in relation to the same. Perhaps the right of the plaintiff would have been more obvious if it had demanded an opportunity on reasonable conditions of collecting the information for itself, especially if the legislature had seen fit to provide by law for its doing so. But it is not necessary to consider whether we are bound by that decision, or, if not, should follow it, since in these cases the claim is not qualified by submission to reasonable rules or an offer of payment. It is a claim of independent rights and a denial that the plaintiff has any right at all. The Supreme Court of Illinois gave no sanction to such a claim as that.

Finally it is urged that the contracts with the telegraph companies violate the act of July 2, 1890, c. 647, 26 Stat. 209. The short answer is that the contracts are not relied on as a cause of action. They are stated simply to show that the only communication of its collected facts by the plaintiff is a confidential communication, and does not destroy the plaintiff's rights. But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the statute or at common law. *Bement v. National Harrow Co.*, 186 U. S. 70; *Fowle v. Park*, 131 U. S. 88; *Elliman v. Carrington*, [1901] 2 Ch. 275. It was argued that the true purpose is to exclude all persons who do not deal through members of the Board of Trade. Whether there is anything in the law to hinder these regulations being made with that intent we shall not consider, as we do not regard such a general scheme as shown by the contracts or proved. A scheme to exclude bucket shops is shown and

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proclaimed, no doubt—and the defendants, with their contention as to the plaintiff, call this an attempt at a monopoly in bucket shops. But it is simply a restraint on the acquisition for illegal purposes of the fruits of the plaintiff's work. *Central Stock & Grain Exchange v. [253] Board of Trade*, 196 Illinois. 396. We are of opinion that the plaintiff is entitled to an injunction as prayed.

Decree in No. 224 reversed. Decree in No. 280 affirmed.

MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE DAY dissent.

[753] TIFT ET AL. v. SOUTHERN RY. CO. ET AL.

(Circuit Court, W. D. Georgia, S. D. June 28, 1905.)

[138 Fed., 753.]

CARRIERS—FREIGHT CHARGES.—The general rule is that, the greater the tonnage of the commodity transported, the lower should be the rate of freight charges for such transportation.

INTERSTATE COMMERCE COMMISSION—CONCLUSIVENESS OF FINDINGS.—Explicit law, the settled policy of the government, the practical principles of reason and justice require that, save for controlling reasons of law or fact, the national courts should not discredit or disparage the conclusions of the interstate commerce commission.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, §§ 138-145.]

SAME—FINDINGS OF FACT.—The findings of fact set forth in the report of the commission are in all judicial proceedings deemed prima facie evidence as to each and every fact found.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, §§ 138-145.]

PRIMA FACIE EVIDENCE.—Prima facie evidence of a fact is such as, in judgment of law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for the purpose. Mr. Justice Story, in *Kelly v. Jackson*, 6 Pet. 631, 8 L. Ed. 523.

INTERSTATE COMMERCE COMMISSION—REPORT—PRESUMPTIONS—BURDEN OF PROOF.—The act to regulate commerce creates a rule of presumption in favor of the commission's report, which on its introduction in evidence changes the burden of proof, and casts it upon that party against whom the report is made.

RULES OF EVIDENCE—LEGISLATIVE CONTROL.—The Legislature, subject only to the limitations of evidence expressly enshrined in the Constitution, has entire control over the rules of evidence, and by statutory enactments may alter, change, or create them anew.

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CARRIERS—FREIGHT CHARGES.—The reasonableness of a rate of charge for transportation is eminently a question for judicial investigation. Justice Blatchford, in *Chicago, M. & St. Paul R. R. v. Minnesota*, 10 Sup. Ct. 702, 134 U. S. 418, 33 L. Ed. 970.

SAME—REASONABLENESS.—It is no longer open to question that the interstate commerce commission is an expert tribunal empowered by law to determine in the first instance the reasonable or unreasonable character of the rate charged for transportation in interstate commerce.

SAME—RATE ASSOCIATION.—The character of the Southeastern Freight Association, the effect of its concert of action and agreements as to freight rates in the territory to which it extends, considered and discussed.

SAME—ADVANCE OF RATES—[AGREEMENTS IN RESTRAINT OF TRADE.]—When a number of railroads, acting under articles of organization, by concert of agreement and action advance the rates upon shipments of a particular class throughout all the territory to which their organization and influence with similar organizations extend, and when they actually advance such rates and exact the same of shippers, it is of no consequence that they have a stipulation in such articles that each and all members can at will and at any time withdraw from the agreement. [Such a combination is in restraint of trade. See pp. 762, 763.]

[754] **SAME—REASONABLE COMPENSATION.**—Reasonable compensation for the service actually rendered is all that a common carrier is permitted to exact. Justice Brewer, for the Circuit Court of Appeals of the Eighth Circuit, in *Chicago & N. W. R. R. Co. v. Osborne*, 3 C. C. A. 347, 52 Fed. 914; *Smyth v. Ames*, 18 Sup. Ct. 418, 160 U. S. 466, 42 L. Ed. 819.

SAME—UNREASONABLE INCREASE.—Where a vast increase of lumber traffic had resulted in large increase of net revenue to the carrier, the service was inexpensive, required neither rapidity of movement nor specially equipped cars, shippers were obliged to furnish and pay for equipment, railroads were neither to load nor unload, the commodity was neither fragile nor perishable, the risk of damage was inappreciable, the industry affords a tonnage second in magnitude to only one other transported by the carrier, an arbitrary increase to points of principal destination of two cents a hundred pounds is unreasonable and unlawful. This is especially clear where the particular traffic is practically destroyed immediately after the advance is made.

SAME—REGULATION OF CHARGES.—Railroads have no legal right to graduate their charges in proportion to the prosperity which attends industries whose products they transport.

SAME—INJUNCTION—REPAYMENT OF UNLAWFUL EXACTIONS.—In this case the conclusions of the court agree with the conclusions of the interstate commerce commission. The enforcement of the advance will be enjoined, and, general counsel for respondents having stipu-

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lated in judicio they would repay to the shippers the sum total of the increased exactions in case such increase should be held illegal, a reference will be had to ascertain the amount thus due the complainants respectively, and decree will be rendered therefor.

(Syllabus by the Court.)

In Equity.

Ellis, Wimbish & Ellis, for complainants.

Ed. Baxter, for respondents.

John I. Hall, for Georgia Southern & F. Ry. Co.

Dorsey, Brewster & Howell, Dessau, Harris & Harris, C. B. Northrop, and *Merrel P. Callaway*, for Southern Ry. Co.

Lawton & Cunningham, for Central of Georgia Ry. Co.

Kay, Bennett & Conyers, for Atlantic Coast Line Ry. Co.

Louis F. Garrard, for Macon & Birmingham Ry. Co.

King, Spalding & Little, for Louisville & Nashville R. Co.

Brown & Randolph, for Seaboard Air Line Ry.

Claude Walker, for Nashville, C. & St. L. Ry. Co.

Mason, Hill & McGill, for Southeastern Freight Ass'n.

SPEER, District Judge.

An adequate statement of the issues in this case is given in the report of the interstate commerce commission which appears in the record. The Southeastern Freight Association is a combination of common carriers. In the preamble of its organic agreement it is stated that its purposes are set forth in the "following articles." A critical scrutiny of the articles will disclose its machinery, but we fail to discover any express statement of its purpose. It is, however, plainly enough to fix and control the rates to be charged by each and all of its members for the railway transportation of freight. Most of the railways constituting its membership are actively engaged in interstate commerce, and all of them may be. The territory to which this association extends [755] its dominating control comprehends the states of Virginia, North Carolina, South Carolina, Georgia, Florida, and those portions of Tennessee and Alabama east of a line extending from Chattanooga via Birmingham, Selma and

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Montgomery to Pensacola. In that territory, with all of its varied products, with an area and population vaster than many empires of which we have an account, as regards every interest dependent upon the transportation of commodities, the action of the association is more authoritative than the firman of the Sultan or the ukase of the Czar. A most important industry of this association's dominion is the manufacture of lumber. The tonnage of this product is enormous. The cotton plant is indigenous to much of this territory, but while in the year 1903 the railroads whose rates are arranged through the Southeastern Freight Association transported 1,274,727 tons of cotton, in the same year, of lumber, they moved 9,808,463 tons, or nearly eight times as much. Indeed, in tonnage thus transported lumber was not approached by any other product, and was only exceeded by bituminous coal. This tonnage has been steadily increasing. In 1901 it had been little more than six and a half millions, and two years later, as we have seen, it was nearly ten millions of tons. The vast income from moving this tonnage, an immense proportion of which was the product of the forests and mills of Georgia, poured into the treasuries of the defendant companies. That it was remunerative is not in dispute. It is charged in the bill that it was very profitable. In the answer it is admitted that it was profitable. The remunerative rates for which this product was transported could scarcely have been denied in view of the fact that the rates themselves had been advanced *pari passu* with the increase of tonnage. For their convenience, the rate makers have divided their territory into what are termed "groups." From group 2 of the Southern Railway there has been an increase of 3 cents a hundred pounds on lumber since May, 1894, 2 cents since September, 1899. From May, 1894, to September, 1899, the rate to Cairo from that group was 13 cents. This was increased to 14 cents from September, 1899, to June, 1903. From other groups, generally speaking, since 1894, the increase has amounted to four cents a hundred pounds. From all the groups the present rates to Cincinnati, Louisville, and Evansville are greater than they have been since 1891. The rate to Cincinnati from most of the groups is now four

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cents higher than it was in 1892, and from the Georgia group on the Southern Railway, to Cincinnati, Louisville, and Evansville and all Ohio river points the rates are three cents higher than they have been since 1891. This steady and marked increase of rates for the transportation of this freight, coincident with the phenomenal increase of the tonnage carried, seems abnormal. "The general rule," said the interstate commerce commission in its valuable report in this case, "is this: The greater the tonnage of an article transported, the lower should be the rate. No rule is more firmly grounded in reason or more universally recognized by carriers." While these conditions were existing, while the respondent railroads were engaged in the transportation of the largest annual ton- [756] nage of lumber theretofore known, in April, 1903, the Southeastern Freight Association and other similar associations having conferred upon the subject, the defendant companies, acting in concert, announced that they would forthwith put into effect an increase of two cents a hundred pounds in the rate on lumber to points on the Ohio river and beyond. This announcement brought the intelligence of this additional levy upon their products to the owners of every mill in Georgia, in Florida, in Alabama, in Mississippi, in Louisiana, and in Arkansas. On the lumbermen at work in the immediate domain of the Southeastern Freight Association estimated on the tonnage of that year the assessment amounted to \$132,000. It is perhaps not surprising that these men immediately sought protection through the courts.

On the 17th of April, 1903, the original bill was filed. The complainants are H. H. Tift, W. S. West, J. Lee Ensign, J. S. Betts & Co., Garbutt Lumber Company, Alapaha Lumber Company, Southern Pine Company, and all other members of the Georgia Sawmill Association (a voluntary association, not a party). The averments, in brief, are that the defendant companies had published, and were to immediately put into effect, an increase of two cents a hundred pounds in the rate on lumber from Georgia points to points of delivery on the Ohio river and beyond; that the threatened advance was unjust and excessive, and would re-

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sult in irreparable injury. An injunction was sought upon the ground that the contemplated action of defendants was in violation of the act of Congress to regulate commerce. A temporary restraining order was issued, with the usual rule calling upon the respondents to show cause why the injunction sought by the bill should not be granted. A general demurrer denying the jurisdiction of the Circuit Court of the United States as such, and as a court of equity, was interposed. Respondents also filed a response to the rule. A hearing was had upon the demurrer, and also upon the evidence submitted by both parties. By interlocutory decree entered on the 16th day of May, 1903, it was held that the court had jurisdiction to grant the relief sought, if finally satisfied of the righteousness of complainants' demand; that the demurrer be overruled; that the bill, with amendments, be retained in the files of the court; and that the temporary injunction be dissolved. The reasons which moved the court to take this action were stated in the opinion that day filed. Among them was the statement that the increase of rates had not been actually imposed. The decree concluded with the following clause:

"In case the respondents shall enforce the rates complained of and the complainants shall make proper application to the interstate commerce commission to redress their alleged grievances, the court will entertain a renewed application on the record as made, and such appropriate additions thereto as may be proposed by either party for enjoining the enforcement of such rates pending the investigation by the commission, unless otherwise dissolved, and on presentation to the court of the report of the commission such other action be taken as will be conformable to law and the principles of equity."

Upon the dissolution of the restraining order, to wit, on the 22d of June, 1903, the respondents at once made the advanced rates effective. On the day following the complainants presented to the [757] interstate commerce commission their complaint and their prayer that the advance be declared to be excessive, unjust, and unreasonable. Subsequently complainants again sought from this court an injunction to restrain the enforcement of the rates pending the action of the commission. Upon this application a full rehearing of the controversy was had. This involved an exhaustive discussion of the jurisdictional questions and the facts as well. The conclusions of the court may be found

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in 123 Fed. 789-796. Action upon the application of complainants was withheld. The reasons for this course, as stated on page 796 of the opinion, are as follows:

"The complainants, it appears, have appealed to the commission.
* * * The respondents are all solvent—probably all of them highly prosperous—railway corporations. It will be easily competent for the complainants to keep careful account of all the charges claimed to be unreasonable and excessive exacted by the defendants on shipments of lumber to the territory described in the bill. If their contention shall be maintained, it will be competent for the court in its final decree to direct the respondents, or either of them, to make restitution of the sums thus exacted. Indeed, the learned special counsel for the respondents, by his statement made in *judicio*, binds his clients to promptly repay to the complainants all such sums in case they shall finally prevail. Nor is it likely that in the interval which shall remain before the commission will act there will ensue any serious impairment of the business of complainants, or either of them. It is easily conceivable that a case or cases of this general character might be presented on which it would seem obligatory on the court to grant an immediate injunction. Such injunctions, however, should not be granted save in cases of grave and compelling exigency. Judicial action should be conservative, and rarely is such conservatism more plainly required than when vast commercial operations involved in interstate transportation will be arrested or disturbed by incautious orders. In this case the duty to grant the extraordinary order sought does not now seem imperative. The court, therefore, in view of the record and of the considerations mentioned, will withhold further judicial action upon the application until properly apprised of the action of the interstate commerce commission. When we shall have received the valuable assistance in the performance of the grave duty before us which must be expected from the conclusions of that authoritative and eminent body, such other and further action will be taken on this application as the law and the principles of equity will seem to direct."

It will thus be seen that the court did not deny the injunction prayed for. It merely withheld action to await the report of the commission. This has now been submitted. After hearing and considering the voluminous evidence, that body, on February 7, 1905, made its report. The report sustains in toto the contentions of the complainants, and declares that the advance in rates complained of was unreasonable, unjust, and violative of the act to regulate commerce. The report was, however, not unanimous. The honorable chairman, Mr. Knapp, and Commissioner Fifer expressed their dissent as follows:

"In the view we take of this case, the conclusions of our associates are not justified by the facts and circumstances appearing in the record, or otherwise entitled to consideration. Holding that the rates complained of have not been shown to be in violation of law, we respectfully dissent from the foregoing report and opinion."

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It is regrettable that the dissenting commissioners did not more fully record the grounds of their dissent. It might then be possible for the court to inquire to what extent the dissent was supported by [758] "facts and circumstances appearing in the record," or by facts and circumstances not so appearing, and which, therefore, do not appear to the court. The order of the commission seeking to make effective their conclusions declares the rates and charges complained of to be excessive, unreasonable, unjust, and in violation of the provisions of the act to regulate commerce. "It is further ordered that the defendants, the Southern Railway Company, Atlantic Coast Line Railway Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railroad Company, Seaboard Air Line Railway, Central of Georgia Railway Company, Georgia Southern & Florida Railway Company, and the Macon & Birmingham Railway Company, be, and each of them is hereby, notified and required to cease and desist on or before the 1st day of April, 1905, from further maintaining or enforcing said unlawful advance of two cents per one hundred pounds, and the said unlawful rates and charges resulting therefrom, for the transportation of lumber as aforesaid."

A certified copy of the opinion and order of the commission has been duly filed. This is accompanied by an application for an injunction pendente lite and for final decree granting the relief prayed in the original bill. Counsel for the respective parties, with meritorious purpose to avoid delay and to obtain a speedy hearing on the merits, entered into a stipulation that the evidence taken before the interstate commerce commission shall stand as the evidence in this court, subject, however, to the right of either party to apply to the court for leave to introduce such additional evidence as the court may think proper for a just decision of the case. On the hearing additional evidence, mainly in the form of affidavits, was submitted by the respective parties. It is agreed that the testimony thus submitted shall have the same force and effect as if it had been regularly taken in accordance with the rules in equity. With equally meritorious purpose counsel for the respective parties agreed

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that this should stand for and be the hearing for final decree in equity. Counsel for the respective parties have been fully heard. The hearing was concluded on the 22d inst. On account of the gravity of the questions involved and the tremendous record, we have taken time for consideration.

The effect of the commission's report was strongly controverted in the argument. Counsel for the complainants insisted that it must be accepted by the court as true, unless it was wholly without evidence to support it. On the other hand, it was insisted that it was only *prima facie* correct, and "tipped the judicial scale only by a hair's breadth." Our view is that it would be violative of explicit law, the settled policy of government, and the most practical principles of reason and justice for the courts of the nation, save for controlling reasons of law or fact, to discredit or disparage the conclusions of the interstate commerce commission. The act to regulate commerce (paragraph 14), declares that the "findings of fact set forth in the report of the commission shall in all judicial proceedings be deemed *prima facie* evidence as to each and every fact found." In paragraph 16 this provision is distinctly reiterated. [759] Nor are we in any doubt as to the import of the expression "*prima facie* evidence." In *Kelly v. Jackson*, 6 Pet. 631, 8 L. Ed. 523, Mr. Justice Story declares that "*prima facie* evidence of a fact is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." The authority of this case has been uniformly recognized. Rose's Notes on U. S. Reports, vol. 3, p. 301. It follows that the report of the commission declaring these advanced rates to be excessive and violative of the act to regulate commerce has such evidential effect that, had complainants been content to introduce the report and to rest their case without further evidence, it would have entitled them to the decree unless the respondents by preponderant and controlling evidence should rebut and disprove its findings. *Lilienthal's Tobacco v. United States*, 97 U. S. 268, 24 L. Ed. 901. In other words, the act of Congress creates a rule of presumption in favor of the commission's report, which, on its introduction, changes the burden of proof, as in this case, from the complainants to the respond-

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ents. "There is not the least doubt, on principle," says the author of the recent work *Wigmore on Evidence*, "that the Legislature has entire control over such rules, as it has over all other rules of procedure in general, and evidence in particular, subject only to the limitations of evidence expressly enshrined in the Constitution." 2 *Wigmore on Evidence*, par. 1354, cl. 3. Elsewhere in the same comprehensive and valuable work, vol. 1, par. 7, it is stated: "Apart from the constitutional rules to protect against statutory changes the Legislature has the power to alter or create any rule of evidence."

The wisdom of according to the report of the commission this important effect is as little open to question. The administration of justice, says Webster, "is the chiefest concern of man upon earth." Within the scope of that function of government there is, perhaps, no single topic of greater magnitude or moment than controversies which arise in trade and commerce. Said Sir Walter Raleigh, "Whosoever commands the trade of the world commands the riches of the world, and consequently the world itself." In a material sense, and in our astonishing civilization, nothing is more important than the transportation of commodities sold or interchanged, and in transportation the stability and reasonable character of the rates charged therefor is scarcely less important than transportation itself. The three grand departments of government, legislative, executive, and judicial, are with steady and swerveless purpose enacting or enforcing laws to safeguard the rights of the general public, and as well as that portion engaged in the business of transportation. The shippers are appealing to government to protect them against unwarrantable exactions by the carriers. Appeal may be made by the carriers to protect their interests from unremunerative rates to which they may be restricted by state or other local authorities. In either case complaint is heard and redress is given. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Chicago, etc., Ry. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; *Rose's Notes on U. S. Re- [760] ports*, vol. 11, p. 946 et seq. It is no longer doubtful that "the question of the reasonableness of a rate of charge

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for transportation is eminently a question for judicial investigation." Justice Blatchford, in *Chicago & St. Paul Ry. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970. To this end, in part, the government has created the interstate commerce commission. It is a tribunal to hear, investigate, and report on the reasonableness of rates, and to attempt the correction of inequalities and injustice therein. Said the Supreme Court in *Louisville & Nashville R. R. Co. v. Behlmer*, 175 U. S. 675, 20 Sup. Ct. 219, 44 L. Ed. 309, "That body, in the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon the questions of fact of the character here arising." In view of these considerations and precedents, it can, we think, be no longer open to question that the interstate commerce commission is the expert tribunal empowered by law to determine, in the first instance, the reasonable or unreasonable character of the rates charged for transportation in interstate commerce. Said Judge Taft, for the Circuit Court of Appeals, in *East Tennessee, V. & G. R. R. Co. v. Interstate Commerce Commission*, 99 Fed. 64, 39 C. C. A. 425:

"It has been suggested that the traffic managers are much better able by reason of their knowledge and experience to fix rates and to decide what discriminations are justified by the circumstances than the courts. This cannot be conceded so far as it relates to the interstate commerce commission, which, by reason of the experience of its members in this kind of controversy, and their great opportunity for full informaton, is in a sense an expert tribunal."

We may repeat what was stated by this court in *Commission v. Louisville & Nashville R. R. Co.*, 118 Fed. 626:

"The righteous orders of the great commission which has been primarily intrusted by Congress with the tremendous duty should in all proper cases be respected and enforced by the courts of the country. While, on occasion, the railway or other corporation may suffer a temporary diminution of revenues from an order of this character, the interest of the public, and in the end the interest of the corporation itself, is conserved. In all such cases the general welfare must control. 'Salus populi est suprema lex.'"

It is proper to observe, however, that the court has considered the entire record, and has formed its conclusions not only from the report of the commission, but from all the evidence submitted to that body and stipulated into the case here, and from the additional evidence submitted de novo on this hearing.

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A highly significant feature of this case is the fact that the rates complained of are the result of concert of action on the part of the members of the Southeastern Freight Association. This organization, as we have seen, embraces as members all of the defendants except the Nashville, Chattanooga & St. Louis Railroad and the Louisville & Nashville Railroad Company. But the latter, as colessee of the Georgia Railroad, while not nominally, is also essentially, a member. The association was a proper, though perhaps not a necessary, party. It might well desire to be heard with regard to the relating charges against its character and conduct. While in the original bill there was a prayer that this association should be declared an illegal combination in restraint of interstate trade, [761] and that the defendant railway companies be enjoined from prosecuting the purposes of such illegal combination through the medium of the freight association, counsel for the complainants in argument properly abandon that prayer. While this is true, it is also true that the methods of the association, and the conduct of its members in this particular case, were placed before the commission, and are fully before the court. In reply to the contention on the part of the respondents that they acted independently each for itself, and not through the agency of the Southeastern Freight Association, the commission finds:

"The proof shows conclusively that the advance was the outcome of concert of action and previous understanding between the companies. Through their authorized official representatives, they conferred with each other repeatedly as to the making of the advance; recognized the fact that, because of competition in common markets between the lumber producing districts served by them, the advance should be from all those districts or none; and, finally, they all promulgated the advance to take effect at exactly the same date and for exactly the same amount. This concurrence of action was not only between the railway companies, parties defendant in this case, and in relation to rates from Georgia shipping points, but was participated in by the lumber-hauling roads serving the territories both west and east of the Mississippi in Arkansas, Louisiana, Mississippi, Alabama, and Florida."

The commission concludes that it is its duty to consider this joint, or concert of, action of the defendants as bearing upon the reasonableness and validity of the advanced rate which results. It holds that the element of competition is eliminated. In the absence of legitimate competition, destroyed, as we shall presently see, by methods obviously illegal, the

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commission presumes that the advance rates are higher than legitimate competition would produce. In other words, the marked increase of charges for transportation of that commodity which, save one other, affords the largest tonnage of freight to the respondent roads, did not originate from a normal or reasonable exigency of the respondents' business. On the contrary, it was an arbitrary exaction, imposed by a combination of railroad agents made in restraint of the natural movement of the product in the lumber trade. This combination or concert of action on the part of the respondent railroads is plainly violative of that provision of the interstate commerce law which forbids pooling. This was enacted, among other things, for the purpose of securing competition. Pooling may be as well effected by a concert in fixing in advance the rates which in the aggregate would accumulate the earnings of naturally competing lines, as by depositing all of such earnings to a common account and distributing them afterwards. That such an association and concert of action between agents of naturally competing lines is destructive of competition is equally unanswerable. To entertain any other view is to ignore reiterated decisions of the Supreme Court of the United States and many rulings of the Circuit Courts and of the state courts. Perhaps the leading cases on this subject are *United States v. Freight Association*, 166 U. S. 341, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Joint Traffic Association Case*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. In the first case the court had under consideration the legality of the Trans-Missouri Freight Association. The agreement of that body may differ in form, but its substantial purpose was the same as that of the Southeastern Freight Association. It avowedly was the "mutual protection to the railroads by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local." After argument by many of the most eminent counsel in the country, and after exhaustive consideration, the court held that the anti-trust law prohibiting contracts, combinations, and conspiracies in restraint of trade or commerce among the several states or with foreign countries apply to and cover common carriers by railroad, and a contract between them in restraint of such

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trade or commerce is prohibited even though the contract is entered into between competing railroads only for the purpose of thereby effecting traffic rates for the transportation of persons and property. It was further held that, in order to maintain such a contention the complainant is not obliged to show that the agreement in question was entered into for the purpose of restraining trade or commerce if such restraint is the necessary effect, and concluded that the anti-trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce. The court then proceeds to declare that the agreement of the association does in fact constitute such a restraint in violation of the law. It is proper to state that four judges, three of whom are not now on the bench of the court, dissented from this conclusion; but the opinion of the majority is, of course, controlling. In the subsequent case of *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, the court, after full consideration, reaffirmed its holding in the Trans-Missouri Case. It further declares that Congress, with regard to interstate commerce, and in the course of regulating it in the case of railway corporations, has power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition. The tremendous significance of these findings is shown by the multitude of cases in which the doctrines announced have been utilized and reaffirmed. See Rose's Notes on U. S. Reports, vol. 12, p. 958 et seq.; also supplement to same publication, vol. 3, p. 795. Perhaps the most noted case on this subject is that of the *Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. There it was held that a contract by which a majority of stock of two companies who owned parallel interstate railroads is transferred to a corporation organized for the purpose of holding and voting the same and receiving dividends and dividing the same pro rata among the stockholders of the two companies, violates the anti-trust law. Such is the superabundance of authority upon this subject that further citation will be superfluous. It may be pardonable to recall that one of the pioneer cases on this important topic was that of

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Rowena Clarke v. Central R. R. & Banking Company of Georgia (C. C.) 50 Fed. 338, 15 L. R. A. 683 et seq., heard in this district. This case was decided in 1892. Commenting upon similar conditions, it was there observed:

[763] "It is not difficult to perceive that a combination of corporations which produces a condition so inequitable cannot be sanctioned by the law. We believe that transactions of this character are within the spirit, if not within the letter, of the act of Congress known as the 'Sherman Anti-Trust Law' (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). It is certainly, as we have seen, obnoxious to the law of Georgia, and it was certainly as obnoxious to the common law."

This decision was made 13 years ago. The principles then announced, which were challenged in many influential quarters, are now imbedded in the country's jurisprudence and in the legislation of the national Congress. It was insisted with great earnestness by the learned special counsel for the respondents that because the various members of the association expressly stipulated in the articles of organization that each and all members could at will and at any time withdraw from the agreement to fix rates, it was not a combination in restraint of trade. This view seems wholly untenable. That is merely a recitation of a privilege which any party to an unlawful enterprise inherently enjoys. Confederates or conspirators who unite to do an unlawful act or to do a lawful act in an unlawful way may jointly or severally abandon the project. The law affords them the *locus penitentiae*. If, however, the object of the conspiracy is accomplished, its character is not to be determined in view of the consideration that the conspirators might have repented, but with an eye single to the fact that they did not repent. Besides, it is indisputable that the agreements of the association were made to be kept, and not to be broken. Good faith between the members, not to mention a powerful compulsory force behind them, obliged that the agreements be kept, and the fact is, as the commission finds, they were kept.

The cardinal error to which the railroads have been committed in this important controversy is the apparent belief that they have the right, by arbitrarily increasing freight rates, to divert at any time to their own treasuries a share of the profits of successful industries or occupations. It

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was not contended that the antecedent rates were unremunerative. As before stated, they were conceded to be profitable. That additional revenue was needed to meet increased expenses was the motive of the advance was testified by Vice President Culp of the Southern Railway Company. To quote his language: They "looked about to see where" they could best, but without injury, get that additional revenue, and one of the commodities which they thought would "bear an advance" was lumber. But the courts have more than once decisively corrected this assumption on the part of railway officials. It is true that the business of railway transportation is usually carried on by private capital invested in corporations. It is, however, business of a quasi public nature. As we have seen, there is no doubt that within the limitations of the Constitution it is subject to governmental control. These facts prohibit the agents of the railway from charging, like the owners of other property, any price they may choose to exact for the use of the railroad. The law does not fail to regard the enormous franchises which have been granted to the railroads by the public, their corporate powers, the right to avail themselves of [764] the right of eminent domain, the right to protection against exorbitant restrictions or exactions from local authority, and other similar considerations. These views are very plainly set forth in the opinion of Justice Brewer sitting with the Circuit Court of Appeals of the Eighth Circuit in the case of *Chicago & N. W. R. R. Co. v. Osborne*, 52 Fed. 914, 3 C. C. A. 347. The conclusion of the learned justice is that reasonable compensation for the service actually rendered is all that the railroad is permitted to exact. Five years after the decision just cited was made the Supreme Court of the United States had before it the same question. This was in the case of *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. This was a case of great importance. The opinion was happily unanimous. It was argued for the appellant by Mr. John L. Webster and by Mr. Churchill, Attorney General of the state of Nebraska, and with them appears the famous name of William J. Bryan. For the appellees there appeared J. M. Woolworth and that renowned leader of the American bar, the late Mr. James C.

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Carter. The case would be additional authority for the jurisdiction of this court in equity to prevent a multiplicity of suits, if such additional authority was needed; but the great duty which fell upon the court was to determine the rule for fixing the reasonableness or unreasonableness of transportation rates. The state of Nebraska had attempted to determine this by fixing an arbitrary maximum for the transportation of interstate commerce. This the court held it could not do. But in holding this it announced certain principles which the controlling officers of railroads, charged as they are with such vital duties to the commerce and welfare of the country, might well take to heart. "The railroad," said the court, "is a public highway, none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the guaranties for the protection of its property." It may not "fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the service rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders."

After careful consideration of the extensive record, there seems to have been an utter absence of excuse or justification for the concerted action of the railroads which advanced the rates on lumber throughout the South. The vast increase of the lumber traffic had resulted in large increase of net revenue for those roads. The service was inexpensive. It required neither rapidity of movement nor specially equipped cars, and such simple equipment as was needed the shippers were obliged to furnish and pay for. The railroads [765] were required neither to load nor unload the cars.

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This was done by the consignor and consignee. The lumber carried was neither fragile nor perishable, and the risk therefore from loss or damage was inappreciable. Mr. Tift, the principal witness for the complainants, and one of the largest lumber men of the state, testified that for 30 years he had not been compelled to present a claim for damage on lumber shipped from his mill. Nor were there any exigencies in the financial condition of the principal defendants which called for so vast a contribution to their treasuries from an industry whose product forms such a large part of their tonnage, and which is so indispensable to the public welfare. On this subject we may, perhaps, with propriety quote literally the figures and findings of the commission. On page 573 of the report it is said:

"The financial condition of the principal defendants appears to have steadily improved for a number of years up to and including the year 1903, in which the advance in rates complained of was made. They were comparatively prosperous at the date of and for years prior to the advance.

"The Southern Railway Company has declared dividends for each year from 1897 to 1903, both inclusive, ranging from \$543,000 * * * in 1897, up to \$4,500,000 (7½ per cent. on \$60,000,000 of preferred stock) in 1903. That road also reports surpluses of from \$464,013 in 1899 to \$2,100,897 in 1902.

"The Louisville & Nashville Railroad Company has declared dividends for each year from 1899 to 1903, both inclusive, ranging from \$1,848,000 (about 3½ per cent. on \$54,912,520 of common stock) in 1899, up to \$3,000,000 (5 per cent. on \$60,000,000 of common stock) in 1903. That road also reports surpluses of from \$40,204 in 1899 to \$2,987,195 in 1903.

"The Atlantic Coast Line Railroad Company has declared dividends for each year (except year 1900) from 1894 to 1903, both inclusive, ranging from \$318,399 in 1894 (5½ per cent. on \$7,021,950 of common stock), up to \$1,714,075 (5 per cent. on \$1,744,100 of preferred stock and 5 per cent. on \$36,650,000 of common stock) in 1903. The surpluses reported by that road are from \$86,875 in 1894 to \$1,293,983 in 1903. In 1900 no dividend was declared, but there was a surplus reported of \$2,152,406.

"The Nashville, Chattanooga & St. Louis Railway Company declared dividends ranging from \$100,000 in 1899 (being 1 per cent. on \$10,000,000 of common stock) to \$400,000 in 1895, 1896, 1897, and 1898, being 4 per cent. on \$10,000,000 of common stock. For each year from 1900 to 1903 that road reported surpluses ranging from \$566,907 in 1900 to \$823,480 in 1903.

"The Georgia Southern & Florida Railway Company declared dividends for each year from 1897 to 1903 ranging from \$27,300 (being 4 per cent. on \$684,000 of preferred stock) in 1897 up to \$99,240 in 1901 (being 5 per cent. on \$684,000 of preferred stock and 6 per cent. on \$1,084,000 of preferred stock) in 1903. For each of the years 1902 and 1903 it declared a dividend of \$77,560. The surpluses reported from 1896 to 1903 range from \$9,657 to \$107,060 in 1896. The surplus for 1901 was \$24,105, for 1902 \$41,448, and for 1903 \$77,968.

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"The Seaboard Air Line railway Company has declared no dividends, but reports surplus of \$252,676 for 1901, \$769,331 for 1902, and \$754,431 for 1903. The Central of Georgia Railway Company declared no dividends, but reports surpluses for each of the years 1899 to 1903, both inclusive, ranging from \$58,888 in 1899 to \$203,506 in 1903. The Macon & Birmingham Railway Company has declared no dividends, and reports a deficit for each of the years from 1894 to 1903, both inclusive, ranging from \$29,099 in 1902 to \$93,715 in 1894. The deficit reported for 1901 was \$34,313, for 1902 \$29,099, and for 1903 \$45,949."

It is true, as insisted, that the operating expenses of the railroads have grown larger, and the percentage of operating expenses to gross earnings has increased. But it is also true that both gross [766] and net earnings have steadily increased. The statement made in argument that the gross earnings of the Southern Railway have increased from \$25,353,686 in 1899 to \$42,313,248 in 1903 does not seem to have been challenged. In the same year the net earnings, it seems, had increased from more than eight millions to more than twelve and a half millions, and the net earnings per mile have increased more than one thousand dollars. While these figures are most encouraging, and will afford gratification to all those who are broad-minded enough to rejoice in the prosperity of the railroads, which do so much for the welfare of the country and the advancement of its civilization, it is also true that this is probably an understatement of the real earnings of this great corporation. It was insisted by Mr. Baxter in his very able argument for the respondents that every expenditure of a railway, no matter how permanent the improvement, must be charged to the expense account of operation. This accomplished lawyer is accustomed to speak authoritatively with regard to the matters intrusted to his care. His statement in *judicio* may be regarded as binding upon all of the respondent companies, and, if accepted, when we consider the vast material improvements which have been made in the southern railways it will be difficult to estimate the marvelous prosperity which they now enjoy. It is true counsel for the railroads insist that their net revenue did not increase in proportion to their gross earnings, but, in the nature of things, this is not to be expected in any business. A manufacturing enterprise of extensive character may make 10 per cent. by the product of its mill. It may double its capacity and double

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its output, but it may look in vain for a double increase in net earnings. How needless, then, was the exaction upon the great lumber industry of the South, which has occasioned this costly litigation with all of its lamentable consequences. The hardship upon the complainants was incontestable. The findings of the commission show that under the old rates they had built up a prosperous trade in the Northwest. Under the new rates this practically ceased. When the court, with what was thought to be caution conservative of the rights of all parties, retained the bill, but declined to continue the injunction, and gave complainants the opportunity to avail themselves of their right to appeal to the commission, this business was practically prostrate. Unhappily, but no doubt necessarily, there was a delay of 19 months before the commission made its finding. In the meantime, for well-known causes of a political nature, there had been a great and enthusiastic revival in the business, enterprise, and confidence of the country. A great demand for yellow pine lumber had grown up in all sections. Builders felt themselves obliged to have it, whatever the price, and whatever the rate, and large shipments were made on the advance rates. This is plainly enough shown by the numerous supplemental affidavits offered by the complainants and received as evidence. This, however, was in no sense ascribable to the action of the Southeastern Freight Association in imposing this rate, but was despite that action. It in no sense relates to the reasonableness or unreasonableness of the rate. And it should not be [767] forgotten that while the business of the lumbermen was recuperating the treasuries of the railroads were all the while receiving a proportionate increment from the unreasonable increase of rates which they had imposed. They have no right to graduate their charges in proportion to the prosperity which comes to industries whose products they transport. With equal reason they might demand an increase of rates for the transportation of cotton with every increase in the value of our great staple. Indeed, to concede the principle for the fixation of rates upon which the railroads through the medium of the Southeastern Freight Association have acted in this case would concede their power to

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levy for no better service augmentation of tolls for every increase of profit in every line of endeavor won by the enterprise, sagacity, and industry of the American people. It is superfluous to add that a government of laws, and not of men, will never tolerate such domination and control of the trade, manufactures, and commerce of the people. These views relate exclusively to the facts before the court in this case as proven incontestably by the evidence and as found by the interstate commerce commission. Here is no attempt to discredit the incalculable services which are hourly rendered the country by the railways. In nothing do we share the animus or purposes of that sinister, selfish, and insincere agitation which would excite, if it could, the masses of the people to hatred and injustice toward corporations. Such a propaganda provokes in the justly balanced mind, and particularly in the mind trained for the administration of law, and for the protection of property and personal rights, disapprobation, and, indeed, abhorrence. With sincere enthusiasm the judge of this court has elsewhere testified to the wonderful material blessings bestowed upon our once prostrate Southland by our great railway systems in "economies of operation, in constant, if gradual, reduction of rates, in increased facilities and more expensive accommodations, in more uniform service for longer distances without change of cars, in abolition of short disjointed lines under different management, in augmentation of shipping facilities, in physical perfection of the properties and consequent safety to the public, in the steady increase in value of all the securities of these great highways of Southern commerce. * * * And with what result? Where formerly asthmatic engines attached to unsafe and noisome trains through the solitudes of an impoverished country like a wounded snake dragged their slow length along, now we behold on massive rails of gleaming steel, on roadbeds of granitic ballast, successive sections of long freight trains sturdily steaming through a prosperous land, smiling with luxuriant crops, beautiful with neat and happy homes, the chimneys of great factories giving employment to thousands, almost marking the miles; or the admiration

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kindles and the pulse leaps as the limited express laden with its human freight glances by on its mission of progress and civilization." In nothing do we abate that enthusiastic approval of the services of the railways to the people; but not more than any other human agency is railroad management infallible. The patriotic and proper solution of every controversy involving the vast ques- [768] tions of transportation is simply the trial of each case on its particular facts, and with an eye single to the merits of the one party or the other. In interstate commerce this is exclusively a duty of the national tribunals, and the laws regulating such commerce are within the exclusive power of Congress.

Innumerable are the cases in which the railroads themselves successfully invoke the identical principles here announced for their own protection against intemperate and injurious local legislation restrictive of their just powers and destructive of the just rights of their stockholders. Such was the case of *Smyth v. Ames*, *supra*. Such was the case of *Chicago, etc., Ry. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970. See, also, *Central R. R. v. Macon* (C. C.) 110 Fed. 871; *Iron Mountain R. R. v. Memphis*, 96 Fed. 122, 37 C. C. A. 410; *Milwaukee, etc., Co. v. Milwaukee* (C. C.) 87 Fed. 577; *Ball v. Rutland* (C. C.) 93 Fed. 516; *Cleveland City Ry. v. Cleveland* (C. C.) 94 Fed. 409; *Chicago, M. & St. P. Ry. v. Tompkins*, 176 U. S. 173, 20 Sup. Ct. 336, 44 L. Ed. 417; *Louisville, etc., v. McChord* (C. C.) 103 Fed. 220. In all of these cases and many others of pertinent character which might be cited, corporations found themselves obliged to resort to the courts to obtain protection against rates which were unreasonably low. The courts of the country will be found prompt to protect them in the righteous exercise of righteous powers. They will be equally prompt in proper cases to protect the public or any individual from unrighteous exactions, particularly when invoked through the agency of unlawful combinations or associations in restraint of trade and commerce, affecting not only the welfare and happiness of the individual, but the thrift and prosperity of entire communities and great commonwealths.

In this case the conclusions of the court as to the issues

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involved agree with the conclusions of the interstate commerce commission as expressed by their report. A decree enjoining all the respondents against further enforcement of the rates complained of will be at once entered. Order will be taken referring to the standing master the pleadings and evidence, with instruction to ascertain the sum total of the increased rate paid by each of the complainants to either or all of the defendant companies since the rate went into effect and to the end of this litigation, and report such amount to the court, in order that, pursuant to the stipulation made by the respondents in open court, in case the complainants prevail, decree of restitution shall be made. Because of the vast extent of the lumbermen's business, and the great expense and inconvenience which might result to them, to the lumber trade, and the railways from the instantaneous enforcement of this injunction, when respondents may have purpose to appeal from this action, it will be ordered further that the decree now granted shall not take effect until 10 days from this date have elapsed, in order that the respondents or either of them, if they so desire, may seek supersedeas.

[155] BOBBS-MERRILL CO. v. STRAUS ET AL.

(Circuit Court, S. D. New York. July 11, 1905.)

[139 Fed., 155.]

COPYRIGHTS—SALES—RESTRICTION—NOTICE—EFFECT.—Where the publishers of a copyrighted book printed a notice on the page following the fly leaf that the price of the book at retail was \$1 net, and that no dealer was licensed to sell it at a less price, and the sale at a less price would be treated as an infringement of the copyright, such notice did not purport to reserve to the publisher any interest in the book, or any right to control it or the action of its owner in the use and disposition thereof, and was insufficient to constitute a license agreement or contract restricting or modifying the absolute title acquired by purchasers.^a

[156] **SAME—INFRINGEMENT.**—Where a publisher of copyrighted books voluntarily parted with all control over them by selling the books to purchasers, such purchasers were neither licensees nor agents of

^a Syllabus copyrighted, 1905, by West Publishing Co.

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the publisher, though buying the books for resale, and hence such resale did not constitute an infringement of the copyright, under Rev. St. § 4964 [U. S. Comp. St. 1901, p. 3413], declaring that it is an infringement of a copyright to print or publish a copyrighted book without the consent of the proprietor given in writing, or knowingly to sell or expose for sale a copy or copies of such copyrighted book "when unlawfully printed or imported," though the books so sold each contained a notice that no dealer was licensed to sell it at a less price than that fixed by the publisher, and that a sale at a less price would be treated as an infringement of the copyright.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, §§ 41, 47.]

SAME.—The act of a publisher of a copyrighted book in putting it on the market and selling it does not constitute a license to the purchaser to use and sell the same, which the publisher is entitled to restrict by a notice brought to the attention of the purchaser that the sale of the book at retail for less than the price fixed by the publisher shall be considered an infringement of the copyright.

SAME—COMBINATIONS IN RESTRAINT OF TRADE—INTERSTATE COMMERCE.—Where the publishers and booksellers of the United States organized two membership associations, one known as the "American Publishers' Association," and the other as the "American Booksellers' Association," and together controlled the publication and sale of at least 90 per cent. of all copyrighted books, the objects of which were to compel owners and dealers of such books to purchase them of the members of the combination at an arbitrary price fixed by it, regardless of the actual value of the books as determined by a demand in an open market, or the condition of the books, and to compel all publishers and dealers of such books to come into the combination, be controlled by it, and sell books at prices fixed by it, regardless of the value of the books or of the exigencies of the trade and situation of the seller, or be deprived of the privilege of purchasing, owning, and selling such books through a system of blacklisting, etc., the effect of which would be to cripple the business of any publisher or bookseller outside of the combination, such agreement was a violation of the Sherman anti-trust law (Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), declaring that every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states is illegal.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 18.]

In Equity.

Suit to enjoin the sale at retail of books containing a copyright novel, "The Castaway," at a price less than \$1 for each copy of the book. Such sales of such book are alleged to be in violation of the terms of a notice printed in each copy thereof upon the page imme-

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diately following the title-page and immediately below the statutory copyright notice. Defendants insist that the books containing such novel have been lawfully printed for sale to the general public, and to be read by the general public, and put upon the market and sold, and that the right of the owners of such books to sell same at such price as they severally may see fit to ask cannot be and is not limited or affected by the notice. They also insist that this suit is to enforce an unlawful combination and agreement, and press other defenses.

Boardman, Platt & Soley (W. H. H. Miller, Albert B. Boardman, and Henry W. Clark, of counsel), for complainant.

Spiegelberg & Wise (John G. Carlisle and Edmond E. Wise, of counsel), for defendants.

[157] RAY, District Judge (after stating the facts as above).

The main facts in this case are not disputed. They may be stated as follows:

(1) The Bobbs-Merrill Company, the complainant, is, and at all times mentioned in the bill of complaint was, a corporation duly organized and existing under the laws of the state of Indiana, engaged in the business of publishing and selling books, and having its principal office in the city of Indianapolis, in the state of Indiana.

(2) The complainant is, and at all times mentioned in the bill of complaint was, the owner and proprietor of a book or novel in one volume, entitled "The Castaway," written by Hallie Erminie Rives.

(3) The allegations contained in paragraphs of the bill of complaint numbered III to VI, inclusive, relating to the complainant's compliance with the copyright laws of the United States, are true. Such paragraphs read as follows:

"III. That your orator is the proprietor of a copyright book or novel in one volume, entitled and known as 'The Castaway.' That the author of said book was Hallie Erminie Rives. That prior to the publication of said book, and prior to the month of May, 1904, the author thereof, said Hallie Erminie Rives, duly sold, assigned, and transferred to your orator all her right, title, interest, and property in and to said book, and your orator thereupon became, and at all times since said sale has been, and still is, the sole and exclusive proprietor and owner thereof.

"IV. That your orator, being then proprietor of said book as aforesaid, and desiring to secure a copyright thereof, before the day of publication of said book duly deposited in the mail within the United

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States, to wit, in the city of Indianapolis, in the state of Indiana, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of said book, and duly paid to said Librarian of Congress the fees required by law, to wit, fifty cents, for recording said title, and your orator did also, not later than the day of publication of said book in this or any foreign country, to wit, on the 24th day of May, 1904, deposit in the mail within the United States, to wit, in the city of Indianapolis, in the state of Indiana, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of said book printed from type set within the limits of the United States.

"V. Your orator is informed and verily believes, and therefore avers, that the Librarian of Congress on the 18th day of May, 1904, duly recorded the name and title of said copyright book in pursuance of the statute in such case made and provided.

"VI. That your orator has given due notice and information of its said copyright by inserting and printing in each and every copy of said book published, upon the page immediately following the title-page thereof, the words and figures: 'Copyright 1904. The Bobbs-Merrill Company. May.'"

(4) No copies of "The Castaway" were sold or otherwise issued prior to securing the copyright thereon.

(5) Each and every copy of "The Castaway" printed, published, or issued by complainant contained at the time of such publication and issue the following notice, printed upon the page of the book immediately following the title-page, and just below the statutory copyright notice:

"The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.

"THE DOBBS-MERRILL COMPANY."

[158] (6) The defendants in the course of their business procured copies of said book before the commencement of this suit for the purpose of sale at retail. The defendants purchased 90 per cent. of said copies from dealers at wholesale at a reduction from said specified retail price of about 40 per cent., and 10 per cent. of said copies they purchased at retail, paying the full retail price therefor.

(7) Defendants at the time of their purchase of copies of said book knew that said book was a copyright book, and were familiar with the terms of the notice printed in each copy thereof, as described in paragraph 5 of this statement, and knew that this notice was printed in every copy of said book purchased by them.

(8) The wholesale dealers, from whom defendants purchased copies of said book, obtained the same either directly

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from the complainant or from other wholesale dealers at a discount from the net retail price, and at the time of their purchase knew that said book was a copyright book, and were familiar with the terms of the notice printed in each copy thereof, as described in paragraph 5 of this statement, and such knowledge was in all wholesale dealers through whom the books passed from the complainant to defendants. But said wholesale dealers were under no agreement or obligation to enforce the observance of the terms of said notice by retail dealers or to restrict their sales to retail dealers who would agree to observe said terms.

(9) The defendants have sold copies of said book at retail at the uniform price of 89 cents a copy, and are still selling, exposing for sale, and offering copies of said book at retail at said price of 89 cents per copy, without the consent of the complainant.

(10) That during the year 1900 a large number of publishers, in the state of New York and throughout the states of the United States entered into an agreement for the purpose of maintaining the net retail price of copyrighted books published by any of them as designated by the publisher of each book, and to prevent the sale at retail of any such copyrighted books by any dealer at retail at less than said fixed net retail price. That pursuant to that agreement a membership corporation was formed under the laws of the state of New York under the name of the "American Publishers' Association," which included among its members the complainant herein and a large majority of the publishers of all books, copyrighted or uncopyrighted, in the state of New York and throughout the United States.

(11) That immediately after the incorporation of said American Publishers' Association a resolution was adopted and its members entered into agreements with each other and with the American Publishers' Association, a copy of which is as follows:

EXHIBIT A.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct some of the evils connected with the cutting of prices on copyright books was adopted at the meeting of the American Publishers' Association held February 13, 1901:

"I. That the members of the American Publishers' Association

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agree that all copyrighted books first issued by them after May 1, 1901, shall be [159] published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all other of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"IV. That the only exception to the rule of maintaining the retail price shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. Libraries entitled to this discount may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount.

"V. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VI. That after the expiration of a year from the publication of any such net copyrighted book dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VII. That when the publisher sells at retail a book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"VIII. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"IX. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"X. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which association shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association

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pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XI. That the report, when adopted by the board of directors, be submitted to the association and voted upon in accordance with the association's rules, article II, section 1."

(12) That thereafter a voluntary association, called the "American Booksellers' Association," was formed, which was intended to and did include a large majority, to wit, about 90 per cent., [160] both in number and extent of business, of all wholesale and retail book dealers throughout the state of New York and the United States. That the avowed purpose of this association was to cooperate with and assist the American Publishers' Association and its members in the maintenance of the so-called net price or restricted price system for the sale of books at retail, and to supply the American Publishers' Association with the names of booksellers who cut the prices of net price or restricted books at retail, and to refrain from selling such price-cutters, or any individuals, firms, or dealers believed to be price-cutters, any books of any kind, whether copyrighted or uncopyrighted, at wholesale or at retail prices. That said American Booksellers' Association thereafter at its annual convention in June, 1901, adopted the following resolution:

EXHIBIT B.

"Reform Resolution No. 1.

"Whereas, the American Publishers' Association has adopted a net price system and entered into an agreement for its maintenance, by which the members of said association will cut off the supply of all their books, net, copyrighted, or otherwise, to any dealer who fails to maintain the net price of any or all books published under the net price system:

"(1) Now, therefore, be it resolved, that this, the American Booksellers' Association, in convention assembled, accept the said net price system, with the distinct understanding that it is the intention of the American Publishers' Association to include fiction under the net price system as rapidly as possible; and

"(2) Furthermore, be it resolved, that all members of the American Booksellers' Association shall give to each of the members of the American Publishers' Association, and to all publishers who co-operate with them in the maintenance of the net price system, our most cordial support; and that to this end we agree not to buy, not to keep in stock, nor to offer for sale, after due notification, the books of any publisher who declines to support the net price system.

"(3) Furthermore, be it resolved, that we instruct our secretary promptly to notify all members of this association that this resolution is applicable and in force with reference to any publisher who shall

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have made it manifest that he is unwilling to co-operate with this association, and with the members of the Publishers' Association, in the maintenance of the net price system.

"(4) Furthermore, be it resolved, that this resolution, on being ratified by two-thirds of the members of this association, voting by formal ballot, shall immediately become a law to each and all of the members of this association; and if it shall appear, upon the presentment of any three members of this association, that a member has purchased, put in stock, or offered for sale the books of the publisher who has been formally denounced, such member shall be expelled from membership in this association, and all members of this association shall then and thereafter be restrained from supplying any books to such expelled member at a discount from the usual retail price.

"(5) Furthermore, be it resolved, that all members of this association shall be restrained from furnishing any books at less than the net or usual retail price to any dealer who shall have been denounced by the Publishers' Association for cutting the price of net books, or for otherwise violating the net price system, and who shall have been therefor cut off by the members of the Publishers' Association from the supply of their books.

"(6) Furthermore, be it resolved, that all members of this association shall endeavor to keep in stock and push the sale of net books so long as they are reasonably in demand, provided such discount is allowed by the publishers to the dealers as will yield them a living profit; and they shall maintain [161] the net prices of the same in accordance with the terms of the publishers' agreement for the maintenance of the net price system.

"I [or we] vote for the adoption of Reform Resolution No. 1 as above stated.

" [Signed]

Name.....

"Address....."

(13) That thereafter and in pursuance of said agreements neither of said associations nor any of the members thereof, including the complainant, would sell or supply, or sanction the sale or supply, of any books at any price to any dealer in the state of New York, or elsewhere in the United States, whether a member of said associations or not, and whether said books were copyrighted or not, or were published by any of the members of the said American Publishers' Association or not, who did not maintain the arbitrary net retail price on copyrighted books published by the members of the American Publishers' Association, or would resell or was believed to resell such copyrighted books to any dealers who thereafter sold the same at less than the arbitrary price named by the publisher and maintained pursuant to the rules and agreements of the two associations and their members.

(14) That on or about the 8th day of January, 1902, the plan, resolutions, or agreements of the American Publishers'

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Association were amended by the addition thereto of the article relating to a certain discount to be allowed from the published price of works of fiction (not net) published by members of the said association, and a change in article 4 relating to discounts to be allowed to libraries, and in article 6, and the omission of article 11 of the original plan. A copy of said resolutions, with the said amended articles indicated by italics, is marked "Exhibit C." Thereafter, on the 27th day of May, 1902, the said plan, resolutions, or agreements were further amended by the addition to article 4 thereof of a paragraph relating to the sending of a work of fiction postpaid, a copy of which said resolutions as so amended is marked "Exhibit D." That thereafter, and on the 15th day of January, 1903, the said plan, resolutions, and agreements were amended by the addition to article 3 of a paragraph relating to the sale of protected books in combination with a periodical, and in article 12 a paragraph was added relating to an agreement to be entered into by all purchasers of books from the members of the Publishers' Association. A copy of said resolutions as amended is marked "Exhibit E." That thereafter, and on or about the 13th day of February, 1903, the said plan, resolutions, or agreements were again amended as to articles 1 and 4, so as to provide for the exclusion at the option of a publisher of certain copyrighted juvenile books from the class of so-called net publications, and the inclusion of such books in the class of copyrighted works of fiction not net. Article 5 was likewise amended so as to grant libraries a discount on certain juvenile books (not net), a copy of which resolutions or agreements as amended is marked "Exhibit F." That thereafter, on the 13th day of January, 1904, the said resolutions or agreements were amended as to articles 1 and 5, so as to apply to all juvenile [162] books, and article 4 thereof was so amended as to provide for the publication and sale of all juvenile books (not net) under the system applying to the publication and sale of copyrighted works of fiction, a copy of which said resolutions or agreements as so amended is marked "Exhibit G."

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EXHIBIT C.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction were adopted at a meeting held February 8, 1902.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"IV. *That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.*

"V. *The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33 1-3 per cent. on fiction. Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.*

"VI. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted books issued under these regulations dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the di-

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rectors of the association be authorized to establish an office and engage a suitable [163] person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to."

EXHIBIT D.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction were adopted at meetings held January 8, 1902, and May 27, 1902.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

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"When a work of fiction published under this rule is sent postpaid, the price to the purchaser shall be not less than the minimum price plus the postage.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33 $\frac{1}{3}$ per cent. on fiction. Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

[164] "VI. That the association suggests a discount on net copyrighted books of 25 per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to."

EXHIBIT E.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction were adopted at meeting held January 15, 1903.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, such works of fiction (not juveniles) and new editions as the individual publisher may desire, books published

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by subscription and not through the trade, and such other books as are not sold through the trade.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, protected [165] books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to the protection of fiction to this extent. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given. When a work of fiction published under this rule is sent postpaid, the price to the purchaser shall be not less than the minimum price plus the postage.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33½ per cent. on fiction. Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

"VI. That the association suggests a discount on net copyrighted books of 25 per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to

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report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association."

EXHIBIT F.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"Plan as Amended to March 4th, 1903.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction, juveniles, and other matters were adopted at later meetings.

[166] "Special attention is called to changes in the following sections: 1, 3 (last paragraph), 4, 5, and 12.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also, at the desire of the individual publisher, any new editions, any work of fiction (not juveniles), or any juveniles of the class that may be described as board books, flat picture books, or toy books.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, protected books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

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"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile board books, flat picture books, or toy books (not net), published after March 1st, 1903, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of fiction and juvenile books published on the same basis as fiction. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

"V. The only exceptions to the foregoing rules shall be in the case of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33½ per cent. on fiction and juvenile board books, flat picture books, or toy books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction.

"VI. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price; and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board the manager shall investigate all cases of cutting reported, and, when directed, shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

[167] "X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association through its agents and members aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important centre or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association.

"Dated March, 1903."

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EXHIBIT G.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"Plan as Amended to January 14th, 1904.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction, juveniles, and other matters were adopted at later meetings.

"Special attention is called to changes in the following sections: 1, 3 (last paragraph), 4, 5, and 12.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also, at the desire of the individual publisher, any new editions, any work of fiction, or any juvenile.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that such net copyrighted books and all others of their books shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their books further to no one known to them to cut such net prices, or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale.

"It is further agreed by the members of the association that they will not themselves offer, nor sell their books to any one who offers, protected books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net), published after April 1st, 1904, the greatest discount allowed at retail for one year after publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of fiction and juvenile books published on the same basis as fiction. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped, will rarely be given.

[168] "V. The only exceptions to the foregoing rules shall be in the cases of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33½ per cent. on fiction and juvenile books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discounts on net books, nor to any special discount on fiction or juvenile books.

"VI. That the association suggests a discount on net copyrighted books of twenty-five per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

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"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations, dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price; and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board, the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions.

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association through its agents and members aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association."

(15) That thereafter, and during the month of February, 1904, in an action brought in the Supreme Court of the state of New York, it being a court of competent jurisdiction, wherein the defendants in this action were plaintiffs and the American Publishers' Association and the American Booksellers' Association and such of their respective members as were within the jurisdiction of the said court were made parties defendant, the New York Court of Appeals, being the highest appellate court in the said state, rendered its decision that the combinations and agreements described in paragraphs 10, 11, 12, and 14 of this statement were unlawful and void, and contrary to the statute law and public policy of the state of New York, and more especially of the statute law of said state known as chapter 690, p. 1514, of the Laws of 1899, which said law, for the purposes of this

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statement, is made part of the record. The prevailing opinion of the court, to which reference is hereby made for the [169] true construction of said decision, reported 177 N. Y. 473, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819, is as follows:

"Isidore Straus et al., Composing the Firm of R. H. Macy & Company, Respondents, v. American Publishers' Association et al., Appellants.

"Monopolies—An agreement Which in Effect Prevents the Sale of Uncopyrighted Books in the State is Illegal under the Anti-Monopoly Act (Laws 1899, c. 690). An agreement between publishers representing ninety-five per cent. of the books published in the United States, and ninety per cent. of the business done in the book trade, that all copyrighted books published by any of them after a specified date should be published and sold at retail at net prices; that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers and jobbers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to them by the association as one who cut such prices; and that evidence shall not be required by the bookseller or jobber in order to restrain him from selling to one who has been blacklisted, but that all that shall be required to govern his action and to prevent him from selling to such persons shall be that the name has been given to him by the association as one who cuts such net prices—is an agreement which, while purporting to secure to the owner and publisher of copyrighted books the monopoly permitted by federal law, may, and as practically construed by the parties does, operate in fact so as to prevent the sale of books of any kind or at any price to any dealer who resells, or is suspected of reselling, copyrighted books at less than the arbitrary net price, whether such dealer be a member of the association or not. Such an agreement undertakes to interfere with the free pursuit in this state of a lawful business in which a monopoly is not secured by the federal statute, viz., that of dealing in books which are not protected by copyright. It is, therefore, in violation of chapter 690, p. 1514, of the Laws of 1899, enacted to prevent monopolies in articles or commodities of common use, and to prohibit restraint of trade and commerce.

"*Straus v. American Publishers' Ass'n*, 85 App. Div. 446, 83 N. Y. Supp. 271, affirmed.

"(Argued January 19, 1904; decided February 23, 1904.)

"Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered July 30, 1903, which reversed an interlocutory judgment of Special Term sustaining demurrer to the complaint.

"Stephen H. Olin and Thaddeus D. Kenneson, for appellants. John G. Carlisle and Edmond E. Wise, for respondents.

"Parker, C. J. Chief Justice Marshall said long ago, in *Grant v. Raymond*, 6 Pet. 217, 241, 8 L. Ed. 376: 'To promote the progress of useful arts is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their

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respective writings and discoveries," is among those expressly given to Congress. * * * It is the reward stipulated for the advantages derived by the public from the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made, and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield. It receives all which it has contracted to receive. The full benefit of the discovery after its enjoyment by the discoverer for 14 years is preserved, and for his exclusive enjoyment of it during that time the public faith is pledged.' That case and many [170] others were considered recently by the United States Supreme Court in *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, Mr. Justice Peckham writing. After an examination of the cases which may be said to restrict the exceptions which grow out of a proper exercise of the police power of the state, of which *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115, is an illustration, he says (186 U. S. 91, 22 Sup. Ct. 755, 46 L. Ed. 1058) : 'Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.' That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the *Park & Sons Co. Case*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, upon which defendants apparently rest their claim that the judgment of the Appellate Division should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein, which will now be pointed out.

"While the leading object of this association and agreement purports to be to secure to the owner and publisher of copyrighted books that protection which the federal government permits them to enjoy for the reasons stated by Chief Justice Marshall (*supra*), it does not stop there. It also affects the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all, if he fails to comply with the rules of the association. A combination creating a monopoly of the sale of books not protected by copyright offends against the law of this state as much as if it related to bluestone (*Cummings v. Stone Co.*, 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655), or to envelopes (*Cohen v. Envelope Co.*, 166 N. Y. 292, 59 N. E. 906); and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible, but probable. But it is not of moment whether such a result is probable or not; for the test to be applied is, what may be done under the agreement? Reference to the complaint makes it clear that the association has undertaken to provide for the practical exclusion from the business of selling books not protected by copyright all who refuse to be bound by the rules of the association; and it appears from the complaint that the practical construction given to this agreement by those operating

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together under it is that, if a dealer is suspected of selling copyrighted books at less than the arbitrary net price, it is quite sufficient to exclude him from selling books altogether. The agreement nowhere suggests that it is the object of the association to control the sale of books not protected by copyright. Indeed, the object of the association seems to be merely to protect the copyrighted books. But while the other part of the scheme is apparently sought to be hidden, it is after all uncovered by the clauses authorizing the exclusion of any members of the association, or those who refuse to be bound by its rules, from selling books of any description. The fifteenth paragraph of the complaint alleges 'that during the year 1900 a number of prominent publishers, including defendants, hereinbefore described as publishers, for the purpose of securing to themselves an unreasonable and extortionate profit, and at the same time with intent to prevent competition in the sale of books, and for the purpose of establishing and maintaining the prices of all books published by them, or any of them, and all books dealt in by them, or any of them, and preventing competition in the sale of books, and for the purpose of establishing the public policy and the statutes of the state of New York * * * combined and associated themselves together,' etc. The sixteenth paragraph refers to the method of organization, and the fact of the adoption of a resolution and an agreement to carry out their object, while the seventeenth states the nature of the agreement as follows: 'That [171] as a part of said unlawful scheme and combination the members of said association agreed that such net copyrighted books, and all other books, whether copyrighted or not, or whether published by them or not, should be sold by them to those booksellers only who would maintain the retail net price of such net copyrighted books for one year, and to those booksellers and jobbers only who would furthermore sell books [the word "copyrighted" is omitted at this point] at wholesale to no one known to them to cut or sell at a lower figure than such net retail price, or whose name would be given to them by the association as one who cut such prices.' It will be seen that, while the leading object of this portion of the agreement apparently is to maintain the retail net price of copyrighted books it operates in fact so as to prevent the sale of books to dealers who sell books of any kind to one who retails copyrighted books at less than the net retail price. And the agreement further provides that evidence shall not be required by the bookseller or jobber in order to restrain him from selling to one who has been blacklisted, but that all that shall be required to govern his action and to prevent him from selling to such a person shall be that the name has been given to him by the association as one who cuts such net prices. It has been admitted, and must be, that the agreement may be so worked out as to deprive a dealer from selling any books whatever, thus breaking up his business.

"But it is said that is only intended as a punishment for one who refuses to be bound by the wishes of the owner of the copyrighted book as to its selling price; in other words, that the association inflicts upon him the penalty of a destruction of his business because of his refusal to abide by the rules of the association. It is, of course, of no consequence how this course of action may be described by those who invented it; for, if it be the fact that the combination which agrees to exclude others from an unprotected business violates the statute, then it matters not what excuse may be offered for it. It is the excuse, not the statute, which must give way. The eighteenth paragraph of the complaint contains what purports to be a practical construction given to this agreement by the members of the association. It states: 'That in pursuance of said unlawful combination and agreement said American Booksellers' Association and its members have continuously co-operated with and assisted the American Pub-

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lishers' Association and the members thereof in establishing and maintaining prices of such books, and preventing competition in the supply and sale of the same, and still continue so to do; and plaintiffs say that in compliance with said agreement neither said associations nor any of the members thereof will sell or supply books at any price to any dealer, whether a member of said association or not, and whether such books are copyrighted or not, or are not published by said American Book Publishers' Association or its members, who resells, or is suspected of reselling, such copyrighted books at less than the arbitrary net price fixed by said unlawful combination, nor will the said association nor any of their members sell or supply any books whatever to any one who resells, or is suspected of reselling, such copyrighted books to any dealer who thereafter sells the same at less than such arbitrary net price.' Here, then, we have a practical construction of the agreement, one put upon it by the parties to it; and it is such a construction as the language employed calls for. And it discloses that the parties who are acting under the agreement assume it to be their right and their duty by virtue of it not to sell or permit to be sold books of any kind or at any price to any dealer 'who resells or is suspected of reselling copyrighted books at less than the arbitrary net price,' whether such dealer be a member of the association or not. The intended effect of this is to prevent any dealer who is even suspected of reselling copyrighted books at less than the net price from obtaining books at any price or on any terms, whether copyrighted or not. And it does not stop there, for the members of the association agree not to supply him any books at any price, whether he resells copyrighted books or not at less than the arbitrary net price, provided he is suspected of selling to any dealer who thereafter sells the same at less than such arbitrary net price. And this means, inasmuch as the members represent 95 per cent. of the publishers and 90 per cent. of the business done in the book trade, that he may be practically driven out of the business if any one chooses to suspect [172] that a dealer to whom he has sold books has resold them at less than the price fixed. The members of the association, therefore, have entered into an agreement which by its terms—as we read it, and as they have construed it in their everyday working under it—undertakes to interfere with the free pursuit in this state of a lawful business in which any member of the community has a right to engage, a business in which a monopoly is not secured by the federal statutes, namely, 'that of dealing in books which are not protected by copyrights; and hence it is in violation of chapter 690, p. 1514, Laws 1899, which provides: 'Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void.'

"The order should be affirmed, with costs.

"Haight, Martin, Vann, and Werner, JJ., concur with Parker, C. J. Gray and Barrett, JJ., read dissenting opinions.

"Order affirmed."

That the judgment upon this decision was duly adopted by the New York Supreme Court and entered on its records.

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(16) That thereafter, and on or about the 13th day of March, 1904, the said resolutions or agreements were amended as to article 3 so as to cover copyrighted books only, and so as to provide for the placing of the seller's name on the cut-off list of the association only under certain changed conditions. A copy of such resolutions as amended, with the words stricken out by said amendment indicated by brackets, and the words thereby added in italics, are hereto annexed and marked "Exhibit H."

EXHIBIT H.

"The American Publishers' Association, 156 Fifth Avenue, New York.

"Plan as Amended to April 1st, 1904.

"The following plan to correct evils connected with the cutting of prices on copyright books was adopted at a meeting of the American Publishers' Association held February 13, 1901:

"Amendments referring to fiction, juveniles, and other matters were adopted at later meetings.

"Special attention is called to changes in the following sections: 1, 3, 4, 5, 9, and 12.

"I. That the members of the American Publishers' Association agree that all copyrighted books first issued by them after May 1, 1901, shall be published at net prices, which it is recommended shall be reduced from the prices at which similar books have been issued heretofore: Provided, however, that there shall be exempt from this agreement all school books, books published by subscription and not through the trade, such other books as are not sold through the trade; also, at the desire of the individual publisher, any new editions, any work of fiction, or any juvenile.

"II. It is recommended that the retail price of a net book, marked 'Net,' be printed on a paper wrapper covering the book.

"III. That the members of the association agree that [such net] copyrighted books [and all others of their books] shall be sold by them to those booksellers only who will maintain the retail price of such net copyrighted books for one year, and to those booksellers and jobbers only who will sell their *copyrighted* books *except at retail* [further] to no one who [known to them to] cuts such [173] net prices [or whose name has been given to them by the association as one who cuts such prices, or who fails to abide by such fair and reasonable rules and regulations as may be established by local associations as hereinafter provided]. A dealer or bookseller may be defined as one who makes it a regular part of his business to sell books and carries stock of them for public sale. It is further agreed by the members of the association that they will not themselves offer, nor sell their *copyrighted* books to any one who offers, protected books in combination with a periodical at less than the trade subscription price of such periodical, plus the net or minimum retail price of the book.

"IV. That the members of the association agree that on all copyrighted works of fiction (not net) published by them after February 1st, 1902, and on all juvenile books (not net) published after April 1st, 1904, the greatest discount allowed at retail for one year after

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publication shall be 28 per cent.; and all the rules for the protection of net books shall apply to this extent to the protection of copyrighted fiction and copyrighted juvenile books published on the same basis as fiction. The conditions governing the sale of fiction are such that the association does not attempt to fix a uniform price at which works of fiction (not net) shall be sold, but only to name a maximum discount, which, however, it is hoped will rarely be given.

"V. The only exceptions to the foregoing rules shall be in cases of libraries, which may be allowed a discount of not more than 10 per cent. on net books and 33½ per cent. on fiction and juvenile books (not net). Libraries entitled to these discounts may be defined as those libraries to which access is either free or by annual subscription. Book clubs are not to be entitled to discount on net books, nor to any special discount on fiction or juvenile books.

"VI. That the association suggests a discount on net copyrighted books of 25 per cent. to dealers as a general discount, leaving the question of discount, however, entirely to the individual publisher.

"VII. That after the expiration of a year from the publication of any copyrighted book issued under these regulations dealers shall not be held to the above restrictions, and may sell such book at a cut price; but if, on learning of such action, the publisher shall desire to buy back at purchase price the copies then remaining in the dealers' hands, they must be so resold to him on demand.

"VIII. That when the publisher sells at retail a net book published under the rules, it shall be at the retail price, and he shall add the cost of postage or expressage on all books sent out of the city in which the publisher does business.

"IX. That for the purpose of carrying out the above plan the directors of the association be authorized to establish an office and engage a suitable person as manager, and endeavor to secure from all dealers in books assent to the above conditions of sale. Under the direction of the board, the manager shall investigate all cases of cutting reported, and when directed shall send out notices to the association, jobbers, and the trade of any persons violating the above provisions, *after giving the person accused of such violation an opportunity to explain his action.*

"X. That it shall be the duty of all members of the association to report immediately to the said office all cases of the cutting of prices which may come to their knowledge.

"XI. That the association, through its agents and members, aid in the formation of booksellers' associations in the important centers and cities in the United States, the object of which associations shall be to assist the Publishers' Association in maintaining prices on net books as aforesaid, and to establish such lawful rules and regulations respecting the conduct of business in their locality as will tend to secure fair, honorable, and uniform methods of business in each important center or section of the country. That the association pledge itself to support such local associations by every means in its power in maintaining such lawful rules and regulations as may in this way be agreed to.

"XII. That in making sales and contracts of sales of their books involving future delivery, members shall stipulate that such delivery is contingent on the observance by the purchaser of the rules of the association."

[174] That thereafter the American Booksellers' Association passed a so-called Reform Resolution No. 2 in April, 1904, which said resolution is as follows:

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EXHIBIT I.

"Reform Resolution No. 2.

"Whereas, the American Publishers' Association has adopted a net price system, and entered into an agreement for its maintenance, by which the members of said association will cut off the supply of all their copyrighted books to any dealer who fails to maintain the net price of any or all copyrighted books published under the net price system:

"(1) Now, therefore, be it resolved, that this, the American Booksellers' Association, in convention assembled, accept the said net price system, with the distinct understanding that it is the intention of the American Publishers' Association to include copyrighted fiction under the net price system as rapidly as possible; and

"(2) Furthermore, be it resolved, that all members of the American Booksellers' Association shall give to each of the members of the American Publishers' Association, and to all publishers who co-operate with them in the maintenance of the net price system, our most cordial support; and that to this end we agree not to buy, not to keep in stock, nor to offer for sale, after due notification, the copyrighted books of any publisher who declines to support the net price system.

"(3) Furthermore, be it resolved, that we instruct our secretary promptly to notify all members of this association that this resolution is applicable and in force with reference to any publisher who shall have made it manifest that he is unwilling to co-operate with this association, and with the members of the Publishers' Association, in the maintenance of the net price system.

"(4) Furthermore, be it resolved, that this resolution, on being ratified by two-thirds of the members of this association, voting by formal ballot, shall immediately become a law to each and all of the members of this association; and if it shall appear upon the presentment of any three members of this association that a member has purchased, put in stock, or offered for sale the copyrighted books of a publisher who has been formally denounced, such member shall be expelled from membership in this association, and all members of this association shall then and thereafter be restrained from supplying any copyrighted books to such expelled member at a discount from the usual retail price.

"(5) Furthermore, be it resolved, that all members of this association shall be restrained from furnishing any copyrighted books at less than the net or usual retail price to any dealer who shall have been denounced by the Publishers' Association for cutting the price of net copyrighted books, or for otherwise violating the net price system, and who shall have been therefor cut off by the members of the Publishers' Association from the supply of their copyrighted books.

"(6) Furthermore, be it resolved, that all members of this association shall endeavor to keep in stock and push the sale of net copyrighted books so long as they are reasonably in demand, provided such discount is allowed by the publishers to the dealers as will yield them a living profit; and they shall maintain the net prices of the same in accordance with the terms of the publishers' agreement for the maintenance of the net price system.

"I [or we] hereby vote to rescind Reform Resolution No. 1 and to adopt Reform Resolution No. 2.

" [Signed] Name
"Address

"Dated March 10, 1904."

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(17) That since May, 1901, the date that the first resolutions and agreements of the American Publishers' Association and the American Booksellers' Association and their respective members went into effect, and until April, 1904, a large majority of all the publishers, in numbers and extent of business, including the complainant here- [175] in, and a large majority of all the booksellers throughout the United States, consisting of about 90 per cent. both in numbers and in extent of business, have obeyed the rules and regulations of the two associations as from time to time amended. They and each of them refused to sell or sanction the sale of any books of any kind, whether copyrighted or uncopyrighted, whether published by any member of the American Publishers' Association or not, to any dealer throughout the United States who did not maintain at retail the net or restricted price at which each copyrighted book was published under the net price or restricted price system, nor would they sell or sanction the sale of any books of any kind to any one who was known or believed to sell such net or restricted copyrighted books at retail at less than the net or restricted price, nor would they sell or sanction the sale of any books of any kind to any one who sold books of any kind to a price-cutter on copyrighted books, or who was known or believed to supply a price-cutter with any books of any kind; and when any dealer or person sold any net price books or restricted price books at less than the net or restricted price, or any jobber or wholesaler supplied a price-cutter with any books of any kind, or was known or believed to so supply him, the two associations circulated and published notices warning all persons in the trade, whether members of either of such associations or not, that the book supply of such persons had been cut off pursuant to the rules of the two associations.

(18) That since April, 1904, any dealer who does not maintain the net or restricted price at retail of any copyrighted book published by any member of the Publishers' Association under the net price or restricted price system cannot purchase any copyrighted books of any kind from any of the members of either of the associations at less than the retail price, whether such copyrighted book is published by any of the members of the associations or not, and whether

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such copyrighted book was published under the net price system or not, or prior thereto.

(19) That the defendants were placed on the cut-off list in May, 1901, because they refused to maintain the net retail price of \$1.40 on the copyrighted book "Tarry Thou Till I Come," published by Funk & Wagnalls, but uniformly sold the same at retail at \$1.24; and since said time their name has been circulated monthly upon the list of dealers whose supplies have been cut off under the rules of the two associations, and against whom the trade at large was warned as price-cutters and as coming under the rules of the two associations as dealers to whom books should not be sold, and, furthermore, that books should not be sold to any one who in turn was known or believed to resell the same to these defendants. That since March, 1904, the rules have been amended and relaxed as above set forth, so as to permit dealings with the defendants in uncopyrighted books only. That as to all copyrighted books of any and all kinds the members of said associations are not permitted under the rules to sell to the defendants, nor to sell to any one who resells or is believed to resell to the defendants; and the cut-off lists or blacklists have been published against these defendants and [176] against such other dealers as have been cut off from their supply of books, copyrighted or otherwise, without any interruption or intermission from the time they were first included in the list of dealers whose supplies were cut off until the present time, without any change in the method employed prior to the passage of the last amendment, which eliminated uncopyrighted books from the rules.

(20) That such combination and agreement as hereinbefore described are now in force, and that it is intended by the members of the two associations and the two associations to continue them in force.

(21) That the complainant was, since May, 1901, a member of the American Publishers' Association, and a party to all the agreements of said association hereinbefore set forth, and obeyed and lived up to all the rules and regulations of the American Publishers' Association hereinbefore set forth, and published all its books, including "The Cast-

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away," in accordance with the rules and regulations of the association above set forth.

(22) That the members of the said two associations, including the complainant herein, do now, and at all the times herein mentioned have, resided and carried on their business of selling books in many different states, and, in the conduct of their respective business as publishers and wholesale and retail dealers in books, the members of the said two associations, including the complainant, were and now are engaged in the business of purchasing books, copyrighted and uncopyrighted, from each other and from other persons, in many states other than the states in which the purchasers resided, or now reside, and do business; and all such books were and have been transported, in compliance with the contract of purchase, from the state where such books were purchased to the purchaser, and delivered to the purchaser in the state where he resided, or now resides in and conducts his business, and members of both of such associations, including the complainant herein, also sell and have sold books to many persons who are not members of the said associations, in states other than the ones in which the sellers reside and conduct their business, and all such books were and have been transported, in compliance with the contract of purchase, from one state to another, and then delivered to the purchaser, and all the rules, regulations, and agreements made by the said two associations and its members, including the complainant, as hereinbefore set forth, were intended to be applied and be enforced, and have been and are now applied to and enforced, against all publishers and dealers in books throughout all the states of the United States, whether such publishers and dealers were or were not members of either of such associations, and whether they purchased books in one state for transportation and delivery in another, or for delivery in the state where purchased.

(23) That the members of the said two associations, including the complainant herein, have heretofore produced, distributed, and sold, and still produce, distribute, and sell, the majority of all books purchased and dealt in throughout the state of New York and all other states and territories of the United States.

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[177] From these facts, which are conceded, it appears that the original purpose of the combination and agreement of the association of publishers, including the complainant, was (1) to maintain the net retail price of all copyrighted books published by the members of such association, or any of them, at such price per book as might be fixed by the publisher of that book, and (2) to prevent the sale at retail of any one or more of such copyrighted books by any dealer in books at retail at a less price per copy than that so fixed. (See finding 10.) Thereupon the persons, firms, and corporations in the combination, including the complainant, formed a corporation under the name "American Publishers' Association." This corporation included a large majority of all the publishers of all books, both copyrighted and uncopyrighted, in the United States. This corporation, immediately on its organization, adopted the resolution (Exhibit A), and it and its members entered into an agreement with each other, and combined together to do the acts and things, and refrain from doing the acts and things, mentioned in such resolution (Exhibit A). That subdivision or paragraph III thereof was illegal and in restraint of interstate commerce is perfectly plain. (See finding 22.) In fact, the effect of the decision of the Court of Appeals of the state of New York, quoted in the findings (finding 15), is so to declare. By paragraph or subdivision X of such resolution the combination to keep up the price of books and limit and restrain interstate commerce was to be further extended. Thereupon the American Booksellers' Association was formed. (See finding 12.) That the object and purpose as there set forth was illegal cannot be doubted. We now have the combination extended to at least 90 per cent. of the booksellers of the United States, and including, not only 90 per cent. of all booksellers, but 90 per cent. of all publishers of books. The combination as existing under those resolutions, etc., is not confined to publishers and sellers of copyright books, but includes the publishers and sellers of all books. The declared object and purpose of this combination is (1) to fix the retail price of books; (2) to maintain such retail price; (3) to refuse to furnish or sell any books to any dealer in books who does not main-

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tain such prices—that is, who sells a book at less than the fixed price; (4) to compel all publishers and dealers in books, in practical effect at least, to come into the combination and enforce and maintain these prices, or be blacklisted and driven from the business; (5) to drive out of the business of general publishing and bookselling all who refuse or neglect to maintain these prices. The freedom of the owner of a book—any book, except those specially excepted—duly purchased and paid for to sell the same, soiled or injured, or read and no longer desired, was thus attempted to be destroyed. The right of a retail bookseller to sell to the purchaser of 50 books for his library at a less price than to the purchaser of one book must not be exercised under the pain and penalty of having his supply of books cut off and of being driven from the business and financially ruined. (See Exhibit B, finding 12.) As to what was done in restraint of interstate commerce, see finding 13.

[178] An attempt was then made by the American Publishers' Association to eliminate the vicious provision of the written agreements and resolutions adopted by the combination by the substitution of article or subdivision III of Exhibit H. (See finding 16.) This must be read with the words included in brackets left out. The American Booksellers' Association followed, with the adoption of Exhibit I, or "Reform Resolution No. 2." In finding 17 is set out what was done up to April, 1904. What has been done by the combination since April, 1904, is set out in finding 18. As appears from finding 19, the defendants were put on the so-called cut-off list, or blacklist, in May, 1901, when the unmodified agreement or combination was being enforced. Its offense was in refusing to maintain the retail price of a copyrighted book, however. Defendants' name has not been taken from the list at any time. It is found and conceded that the complainant is living up to and enforcing the agreements, rules, and regulations aforesaid, as modified, of course, and has published and is publishing all its books, including "The Castaway," because thereof, and in accordance and compliance therewith. It follows, necessarily, from the facts recited from 1 to 23, inclusive, and is found as a further fact, that the notice in "The Castaway," on the page follow-

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ing the fly leaf, viz.: "The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright. The Bobbs-Merrill Company"—is an act done by the complainant, acting in combination with the said American Publishers' Association and the American Booksellers' Association, and the members thereof, in execution of the said combination and agreement, and for the purpose of enforcing same, and because of the said combination and agreement as evidenced by the acts of, and the resolutions and rules adopted and made by, such associations, and agreed to and being executed by the members of said association, including this complainant. It also follows and is found as a fact that such notice was put in such books, and that its enforcement as an alleged license agreement is attempted, by means of this action, not because the complainant reserved or intended to reserve to itself any interest in said books containing such printed notices, nor because it merely licensed or intended to license the purchasers thereof, who purchased same in the first instance from the complainant, to use or sell such books in a certain way, or on certain terms and conditions, or at certain prices, but as an attempt by complainant, as a member of said American Publishers' Association, to enforce as against this defendant the rules of such associations and combination fixing prices, in an effort to maintain them. It is part of a scheme, and the right of the complainant to maintain this action depends on the validity of that scheme or combination. Is such notice in such books sufficiently explicit in its terms to constitute a license agreement or contract, or any restrictions on or modification of the absolute title thereto in the defendant? It does not purport to reserve to the complainant any interest in the book, or any right to control it, or the action of its owner in his use and disposition of it, except by possible inference.

[179] In *Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co. et al.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, the owner of a patent for fastening buttons to shoes with metallic fasteners made and sold the machines with this notice on a metal plate, so conspicuously fastened

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thereto that all must see it, and so securely fastened as to constitute substantially an integral part of the machine, viz:

"Condition of Sale.—This machine is sold and purchased to use only with fasteners made by the Peninsular Novelty Company, to whom the title to said machine immediately reverts upon violation of this contract of sale."

Here is a plain, unequivocal statement, one that cannot be misconstrued or misunderstood, that there is a condition attached to the sale, viz., that the machine is to be used with fasteners of a certain make only, and that a use with other fasteners will be such a violation of the agreement as to defeat the title or right given. This was seen by the purchaser, and he took the machine on that condition, and by so doing agreed to the condition and became bound thereby. He became a mere licensee. He acquired the right to use that machine in a certain way only.

In *Cortelyou and Another and Neostyle Company v. Charles Eneu Johnson & Co.* (recently decided by this court) 138 Fed. 110, the patented rotary neostyle was sold with this notice on a metal plate firmly and conspicuously attached thereto, viz.:

"License Agreement.—This machine is sold by the Neostyle Company, and purchased by the user with the express understanding that it is licensed to be used only with stencil paper and ink (both of which are patented), made by the Neostyle Company New York City."

When the purchaser took this machine he assented to this condition and became bound by it, and became a licensee. He is told that he is licensed to use the machine in a certain way and with certain supplies only. Had he been licensed to sell only—that is, made an agent to sell—and empowered to sell at a certain fixed price only, it is unquestionably true that, had he violated the agreement by selling at a lower, or even a higher, price, he could have been enjoined. Having the sole power to vend his patented articles, he would undoubtedly have the right to fix the price at which they should be sold, and stop sales made by his agents and licensees in violation of the authority conferred. This is now settled as to a patent right. *Bement v. National Harrow Co.*, 186 U. S. 70, 88, 92, 93, 22 Sup. Ct. 747, 46 L. Ed.

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1058. In the opinion in that case (pages 92-93, 186 F.S., page 755, 22 Sup. Ct., 46 L. Ed. 1058), we find the following:

"The contracts plainly look to the sale, and they also determine the price of the article sold, throughout the United States, as well as to the manufacture in the state of Michigan. As these contracts do, therefore, include interstate commerce within their provisions, we are brought back to the question whether the agreement between these parties with relation to these patented articles is valid within the act of Congress. It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addystone [180] Pipe, etc. Company, v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions, imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. * * * The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.

In *Victor Talking Machine et al. v. The Fair*, 123 Fed. 424; 61 C. C. A. 58, the syllabus reads:

"The owner of a patent, who manufactures and sells the patented article, may reserve to himself, as an ungranted part of his monopoly, the right to fix and control the prices at which jobbers or dealers buying from him may sell to the public, and a dealer, who buys from a jobber with knowledge of such reservation and resells in violation of it, is an infringer of the patent."

And in the opinion, after stating that the grant of a patent by its terms covers three separate or separable fields, the learned judge giving the opinion says:

"The field of sale is as much within the monopoly as the others, and so it has been decided. *Bement v. National Harrow Co.*, 188 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. And in *Edison Phonograph Co. v. Kaufmann* (C. C.) 105 Fed. 960, and *Same v. Pike* (C. C.) 116 Fed. 863, the holdings were that a patentee may reserve to himself, as an ungranted part of his monopoly of sale, the right to fix and control the prices at which jobbers and dealers may sell the patented article to the public, and that whoever without permission enters the reserved portion is an infringer."

In the *Victor Talking Machine Case*, *supra*, the notice affixed to the machine read:

"Notice.—This machine, which is registered in our books No. ———, is licensed by us for sale and use only when sold to the public at a

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price not less than \$———. No license is granted to use this machine when sold at a less price. * * * A purchase is an acceptance of these conditions. All rights revert to the undersigned in the event of any violation.

“VICTOR TALKING MACHINE CO.”

In the *Edison Phonograph Company Cases*, cited (see *supra*) by Judge Baker in the Victor Talking Machine Case, *supra*, there was a restrictive contract, and this was referred to in the following language by a notice on the box containing the instrument when sold, viz.:

“*Notice to Dealers.*—This record is sold subject to restrictions as to the persons to whom and the prices at which it may be sold. Any violation of such restrictions makes the seller or user an infringer of the Edison patents.”

A reference to the case in 116 Fed. 863, will show that the restriction was very clear and explicit. The notice in “*The Castaway*” does not suggest a restriction upon the title to the book, or that the person or persons taking the book for sale are obtaining anything short of an absolute title; and no one would suppose that the [181] publisher of the book would attempt or assume to fix the price at which dealers should sell after obtaining absolute title to the book from such publisher. The words, “No dealer is licensed to sell it at a less price,” are notice that licensees, not absolute owners, are so restricted. The words, “and a sale at a less price will be treated as an infringement of the copyright,” clearly do not even tend to make such a sale by an absolute owner of such books an infringement of the copyright.

It is a close question whether a copyright may be infringed by selling in violation of express and explicit restrictions placed on the dealer, expressly made an agent or licensee only, as to the mode of sale or the price at which same is to be sold. Act March 3, 1891, c. 565, 26 Stat. 1106 [U. S. Comp. St. 1901, p. 3406], entitled “An act to amend title sixty, chapter three, of the Revised Statutes of the United States, relating to copyrights,” amends section 4952 so as to read:

“The author * * * or proprietor of any book * * * shall, upon complying with the provisions of this chapter have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same.”

Section 7 of that act (26 Stat. 1109 [U. S. Comp. St. 1901,

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p. 3413]) amends section 4964 of the Revised Statutes so as to read as follows:

"Every person, who after the recording of the title of any book and the depositing of two copies of such book, as provided by this act, shall, contrary to the provisions of this act, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, print, publish, dramatize, translate, or import, or knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction."

This section declares what acts constitute a violation of the copyright of a book. It declares that, to constitute a violation of the copyright, the offender must have, within the term limited—that is, the life of the copyright—and without the consent of the proprietor thereof, first obtained in writing and executed in the presence of two or more witnesses, printed or published or imported, contrary to the provisions of the act, such copyrighted book, or contrary to the provisions of the act, within such time and without such consent, must have sold or exposed to sale a copy of such copyrighted book, known to have been illegally printed. In substance this section declares that it is an infringement of a copyright to print or publish the copyrighted book without the consent of the proprietor, given in writing, signed in the presence of two witnesses, or to import a copy of such book without such consent, or knowingly to sell or expose for sale a copy or copies of such copyrighted book when unlawfully printed or imported. From this it would appear that an infringement by the sale of a copyrighted book consists in the selling or exposing for sale of a copy of such book that has been unlawfully printed or imported. If this be the law, it is not an [182] infringement of a copyright to sell or expose for sale a copy or copies of such book, when the same was lawfully printed or lawfully imported. The result would be that it is not an infringement of the copyright of a book to sell a copy or copies thereof lawfully printed, as in this case, in violation of a mere condition imposed upon a dealer by the publisher, by which such dealer agrees not to sell below a certain price; the title to the book having been vested in such dealer by the publisher thereof, or even

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in cases where the absolute title had not passed to the dealer. If the publisher of the book, being the proprietor of the copyright, parts with the title to such book, either a single copy or a number of copies, and receives his pay therefor, he has voluntarily parted with all control over that or those particular books. The owner of those books is neither a licensee nor an agent. He has the absolute property therein, and the absolute ownership of an article of personal property carries with it the right to give away or sell for such consideration as the owner sees fit to impose, prescribe, or demand, so long as he violates no law. This view of the copyright laws of the United States, as amended by the act of March 3, 1891, seems to be taken by Macgillivray in his work on the Law of Copyright, p. 287, c. 4, § 2. He there says:

"Prohibited Acts and Remedies.—It is an infringement, subject to the remedies stated below, to do any of the following acts in respect of a copyrighted work: In the case of books, without the consent of the proprietor, in writing, signed in the presence of two witnesses (1) to print or publish; (2) to dramatize or translate; (3) to import; (4) knowingly to sell or expose for sale copies unlawfully made or imported."

We find no suggestion that it is an infringement of the copyright of a book for the owner of the book to sell copies at a price which violates a valid contract between the publisher of the book and the dealer, and which was made at the time such dealer became the owner.

In *Harrison v. Maynard, Merrill & Co.*, 26 U. S. App. 99, 61 Fed. 689, 10 C. C. A. 17, the complainants, publishers of books and the owners of a copyrighted book, sent a quantity of the printed and unbound sheets of such book to the bindery of one Alexander for binding, and such sheets were to be stored until complainants should order bound copies. Sometimes they bound copies in advance. A fire occurred in the bindery, and both complainants and Alexander supposed the commercial value as books of all such bound or unbound sheets of such books in such bindery was destroyed. On examination complainants' agent so reported. Thereupon Alexander, without objection from complainants, sold the entire débris to one Fitzgerald, who, without moving it, sold same to some dealers in old paper. Alexander imposed no restriction or condition when he sold. Fitz-

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gerald, who had become the owner of the débris, including the printed sheets and bound volumes, put this condition and restriction in the bill of sale:

"It is understood that all paper taken out of the building is to be utilized as paper stock, and all books to be sold as paper stock only, and not placed on the market as anything else."

[183] Harrison, a dealer in books, visited the place and purchased of these dealers in old paper some of the volumes of the copyrighted book not destroyed, and put them on the market. He had no notice of the restriction or condition put in the bill of sale given by Fitzgerald. Complainants, owners of the copyright, brought suit to enjoin such sale by Harrison. On these facts the court (Wallace, Lacombe, and Shipman, Circuit Judges) held that, so long as the owner of a copyright retains the title to the copies of the book which he has the exclusive right to vend by virtue of the copyright, he can impose restrictions upon the manner in which and upon the persons to whom the copies are to be sold. They also held that if the agents of the owner of the copyright, intrusted with the possession of such books, violates his instructions and fraudulently sells to a person who has knowledge of the restrictions, such sale by the agent constitutes a fraud upon the owner of the copyright, and that such fraud constitutes an infringement of the copyright, with which the owner has never parted, and that such fraud—meaning, of course, such sales—can be restrained by virtue of the statutes applicable thereto. The court states that this right to enjoy the benefit of the copyright statutes results from the fact that the owner has never parted with the title to the book or the copyright, although he may have parted with the possession of the book. The court also holds that the right to restrain the sale of a particular copy of the book by virtue of such statutes has gone when the owner of the copyright and of that copy has parted with all his title to it, and has conferred an absolute title to the copy upon a purchaser, although with an agreement for a restricted use. If this is true of one particular book, it is also true of a large number of copies. The court also says, in substance, that the new purchaser cannot reprint the copy, but that, the copy having been absolutely sold to him, the

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ordinary incidents of ownership in personal property, among which is the right of alienation, attaches to it. The court further says:

"If he has agreed that he will not sell it for certain purposes or to certain persons, and violates his agreement and sells to an innocent purchaser, he can be punished for a violation of his agreement; but neither is guilty under the copyright statutes of an infringement. If the new purchaser participates in the fraud, he may also share in the punishment."

The court cites in support of these statements *Clemens v. Estes*, 22 Fed. 899. If this be a correct statement of the law, and this court does not doubt that it is, we recur to the simple proposition whether or not the complainant in the case now under consideration, the Bobbs-Merrill Company, retained any title in the books in question by printing on the page following the title-page the statement, "Copyright 904. The Bobbs-Merrill Company. May." And thereunder the statement:

"The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.

"THE BOBBS-MERRILL COMPANY."

The defendants in this case purchased 90 per cent. of its copies of this book from dealers at wholesale at a reduction of 40 per cent. from said mentioned retail price. The other 10 per cent. of their [184] copies they purchased at retail, paying the full retail price therefor. The defendants knew of the statement printed in said books above quoted, and knew that it was printed in each copy of the book. The wholesale dealers from whom the defendants purchased their copies obtained such copies either from complainants direct or from other wholesale dealers at a discount from the above-mentioned retail price. Such wholesale dealers knew that the book was copyrighted, and were familiar with the said statement printed in each copy thereof. The books that came to the defendants prior to reaching them did not pass through the hands of any person or persons who were ignorant of the said notice printed therein. It is expressly found, however, and conceded, that these wholesale dealers from whom the defendants here obtained their copies were under no agreement or obligation to enforce the observance of the

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terms of said notice by retail dealers, or to restrict their sales of copies of such book to retail dealers who would agree to observe the said notice.

As has been stated, the notice contains no suggestion that the title of the purchaser to the book is in any way limited. The notice is that the price of the book at retail is one dollar net; and, if the words "no dealer" are to be construed as referring solely to retail dealers, then the notice is that the Bobbs-Merrill Company has not licensed any retail dealer to sell the book at retail for less than one dollar per copy. The fair meaning of this is that, in cases where the Bobbs-Merrill Company has granted a license to some retail dealer or dealers to sell the book, such licensee or licensees are limited and restricted in his or their authority; but the notice is not a suggestion or an intimation to any person that those who buy and pay for the book in the open market, or even of the Bobbs-Merrill Company, without entering into an express license agreement different from that suggested by this notice, are bound or obligated in any way to demand one dollar per copy for such book. It well may be that the Bobbs-Merrill Company has licensed or will license certain dealers to sell this book, and when it grants a license it has the right to impose conditions on its licensees; but this notice does not state or suggest that every purchaser of one of these books containing this notice becomes a licensee with a limited title, or, in fact, no title, to the book. A person cannot be both licensee and absolute owner.

Again, it is contended that the words "the price of this book" refer to the particular copy containing the notice, and that the words "no dealer is licensed to sell it" refer to the particular copy containing the notice. It is further contended that the court is bound to give this construction to this language, and that therefore the defendants, having knowledge of the notice, assented to the proposition and in effect entered into a contract or agreement with the Bobbs-Merrill Company whereby they became its agents to sell the copies at one dollar per volume, and no less, or its licensee with power to sell such books, for which it had paid the wholesale dealer the price demanded, at one dollar per copy only. This court refuses to give that construction to this notice. This

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court declines to hold [185] that the words in such notice "this book" and "it" refer to the particular copy of the book in which the notice is found. The language of the notice is a general statement, referring to the book known as "The Castaway" generally, and not to any particular copy or copies thereof, and, at best, is but a notice that licensees of the publishers are only at liberty to sell such book at one dollar per copy. The notice forms no part of a contract between the purchaser from the publisher and such publisher, nor does it limit or restrict the title of the purchaser. And this court will say here that it would be lending itself to the perpetration of a fraud upon the public should it hold differently. If the Bobbs-Merrill Company, in putting its books upon the market, desires to say to wholesalers and to retailers that it is not selling the entire title to the copies put upon the market, let it say so in plain and unambiguous terms. Let it say in its notice that the purchaser of copies of the book from either the publisher or any wholesale or retail dealer is obtaining but a limited or qualified title in the copies purchased, or that in purchasing one or more copies such purchaser becomes but a mere licensee of the publisher, without title to the copies, and with power to dispose of the same only on receiving a specified sum of money. The Circuit Court of Appeals, in *Harrison v. Maynard, Merrill & Co.*, *supra*, also quotes with approval the language of Judge Hammond in *Henry Bill Publishing Co. v. Smythe* (C. C.) 27 Fed. 914-925, viz.:

"The owner of the copyright may not be able to transfer the entire property in one of his copies and retain for himself an incidental power to authorize a sale of that copy, or, rather, the power of prohibition on the owner that he shall not sell it, holding that much, as a modicum of his former estate, to be protected by the copyright statute; and yet he may be entirely able, so long as he retains the ownership of a particular copy for himself, to find abundant protection under the copyright statute for his then incidental power of controlling its sale. This copyright incident of control over the sale, if I may call it so, as contradistinguished from the power of sale incident to ownership in all property—copyrighted articles, like any other—is a thing that belongs alone to the owner of the copyright itself, and as to him only so long as and to the extent that he owns the particular copies involved. Whenever he parts with that ownership, the ordinary incident of alienation attaches to the particular copy parted with in favor of the transferee, and he cannot be deprived of it. This latter incident supersedes the other—swallows it up, so to speak—and the two cannot coexist in any owner of the

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copy, except he be the owner at the same time of the copyright; and, in the nature of the thing, they cannot be separated, so that one may remain in the owner of the copyright as a limitation upon or denial of the other in the owner of the copy."

In *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631, decided October 17, 1901, without dissent, the court, speaking of copyrights, said:

"The law of copyright also gives privileges to authors and publishers that do not pertain to property which anybody may make and sell if he can; but even under the law of copyright, when the owner of a copyright and of a particular copy of a book to which it pertains has parted with all his title to the book, and has conferred an absolute title to it upon a purchaser, he cannot restrict the right of alienation, which is one of the incidents of ownership in personal property. *Harrison v. Maynard*, 61 Fed. 689, 10 C. C. A. 17. See, also, *Clemens v. Estes* (C. C.) 22 Fed. 899; *Meyer v. Estes*, 164 Mass. 457, [186] 41 N. E. 683, 32 L. R. A. 283; *Waterman Co. v. Waterman*, 27 App. Div. 133, 50 N. Y. Supp. 131."

The same doctrine is plainly expressed in *Keeler v. Standard Folding Bed Company*, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848. In that case it was held that one who purchases patented articles of manufacture from one authorized to sell them at the place where sold becomes possessed of an absolute property in such articles, unrestricted in time or place. In that case the complainants were the assignees for the state of Massachusetts of certain letters patent granted to one Welch. This assignment as matter of course gave to the complainants the rights of the patentee in and for the state of Massachusetts, viz., the sole right to make, use, and sell the patented article in that state. The Welch Folding Bed Company owned the patent rights for the state of Michigan, and it of course had the same right to make, use, and vend the patented article in that state. The defendants purchased a car load of the patented articles from the Welch Folding Bed Company at Grand Rapids in the state of Michigan. It proposed to sell these articles in the state of Massachusetts, and thereafter did sell some of such articles in the state of Massachusetts, and was engaged in selling the remainder in that state at the city of Boston when the bill of complaint was filed. The Supreme Court held that the defendants, having purchased the patented articles in Michigan from the assignee of the patent for the territory included within the boundaries of the state of Michigan, had the right to sell them anywhere within the

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United States, including the state of Massachusetts, notwithstanding the fact that all the patent rights for the state of Massachusetts had been assigned to another person, to wit, to the complainants. The decision is based upon the proposition that where the patentee, not having parted with his rights granted by the patent, makes and vends a patented article, the purchaser can use the article in any part of the United States, and, unless restrained by contract with the patentee, can sell or dispose of the same in any part of the United States. The court says:

"It has passed outside of the monopoly, and is no longer under the peculiar protection granted to patented rights."

The court approves the language of Mr. Justice Clifford in *Goodyear v. Beverly Rubber Co.*, 1 Cliff. 348-354, Fed. Cas. No. 5557, wherein he states, in substance, that, the patentee having manufactured the article and sold it for a satisfactory compensation, the patentee, so far as that quantity of the product of his invention is concerned, has enjoyed all the rights secured to him by his letters patent, and the manufactured article, and the material of which it is composed, go to the purchaser for a valuable consideration, discharged of all the rights of the patentee previously attached to or impressed upon it by the law under which the patent was granted. The court further says:

"If, as is often the case, the patentee has divided the territory of the United States into 20 or more specified parts, must a person who has bought and paid for the patented article in one part, from a vendor having an exclusive right to make and vend therein, on removing from one part of the country [187] to another, pay to the local assignee for the privilege of using and selling his property, or else be subjected to an action for damages as a wrongdoer? And is there any solid distinction to be made in such a case between the right to use and the right to sell?"

The court then cites with approval several cases, and especially the language of Mr. Justice Clifford in *Mitchell v. Hawley*, 16 Wall. 544, 546, 547, 21 L. Ed. 322, as follows:

"Patentees acquire by their letters patent the exclusive right to make and use their patented inventions, and to vend to others to be used, for the period of time specified in the patent; but when they have made one or more of the things patented, and have vended the same to others to be used, they have parted to that extent with their exclusive right, as they are never entitled to but one royalty for a patented machine, and consequently a patentee, when he has himself constructed a machine and sold it without any conditions, or au-

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thorized another to construct, sell, and deliver it, or to construct, use, and operate it, without any conditions, and the consideration has been paid to him for the thing patented, the rule is well established that the patentee must be understood to have parted to that extent with all his exclusive right, and that he ceases to have any interest whatever in the patented machine so sold and delivered or authorized to be constructed and operated. Where such circumstances appear, the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee or his assigns."

At page 666, 16 Wall., 21 L. Ed. 322, the court calls attention to the case of *Wilson v. Rousseau*, 4 How. 646, 11 L. Ed. 1141, and says that it was there held that:

"As between the owner of a patent on the one side, and a purchaser of an article made under the patent on the other, the payment of a royalty once, or, what is the same thing, the purchase of the article from one authorized by the patentee to sell it, emancipates such article from any further subjection to the patent throughout the entire life of the patent, even if the latter should be by law subsequently extended beyond the term existing at the time of the sale; and in respect of the time of enjoyment, by those decisions the right of the purchaser, his assigns, or legal representatives is clearly established to be entirely free from any further claim of the patentee or any assignee."

The court then says:

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws."

In the case now before this court it appears that the publisher of the book "*The Castaway*" printed and sold these copies. It put them upon the market. It received its price therefor, and reserved no right to demand any further compensation. The defendants purchased in the open market and paid the price demanded. It is conceded that the wholesalers of whom the defendants purchased were under no contract or obligation to impose any condition upon the defendants, and they did not. There is no privity of contract between the defendants and the complainants. There is no sug- [188] gestion in the notice that the retail dealer who buys the copies of the book in the open market enters into

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any contractual relation with the publishers. It is not stated that the copy of the book is sold on condition that the purchaser will abide by and enforce the price arrangement. The notice is assertive in its terms. It is a dictum. It says that the price of the book at retail is one dollar net. The plain meaning of this language is that if the signer of the notice sells a copy of the book, or the book in question, containing the notice, at retail, the price is one dollar. The notice also asserts that the Bobbs-Merrill Company has not licensed any retail dealer to sell at a less price. It does not say or suggest that the Bobbs-Merrill Company has not sold millions of copies of the book for the trade, parting with the title absolutely and unconditionally. This court is aware that the Keeler Case, cited above, is a patent, and not a copyright case; but the principle is the same.

In a supplemental brief filed by the counsel for the complainant, he states that he does not consider the notice published in the book as in the nature of a license. He says:

"In my opinion, the putting of the book upon the market and selling it by the owner of the copyright constitutes the license; and this notice published in the book is a limitation and qualification of that license. If the book is put out without any notice, the license is unqualified, and the sale is absolute; but my contention is that the owner of the copyright has the authority to restrict the license, and, being published in this way, the restriction attaches to the property, and is a charge and limitation upon the rights of all parties purchasing the book for resale."

This is a claim that the owner of a copyright for a book, who prints the book and sells it for a consideration, gives to the purchaser a license, and does not sell and convey a piece of personal property absolutely. The contention here is that any notice printed in a book and brought to the attention of the purchaser is a restriction of that license to that extent, and may be enforced, and that a violation of the obligation imposed by the notice is an infringement of the copyright which may be restrained by the federal courts. This doctrine, it seems to this court, is contrary to the adjudicated cases. I do not think this contention can be sustained upon principle. Clearly it is opposed to public policy. The purchaser of an article not patented may duplicate it if he can. The purchaser of an article made under a patent right may not duplicate it, but he may use the article purchased and

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sell the same as his own in any way or for any price he sees fit. The purchaser of a book not copyrighted may duplicate it—make copies or a reprint. The purchaser of a copyrighted book may not make or print or publish a copy, as this would be an infringement of the copyright; but this restriction in no way interferes with the absolute ownership of the particular copy of the book. The owner of an article made under a patent right or of a book printed under a copyright is in no sense a licensee of the patentee or of the owner of the copyright.

“License,” with reference to real estate, is a permission or authority to do a particular act or a series of acts on the land of another without possessing any estate therein. So, with reference [189] to personal property, “license” implies and carries the power to do some act upon or in reference to or to do something with the property of another. Herein it differs from an easement. The word “easement” always implies an interest in the land. See Words & Phrases, vol. 5, tit. “License.”

What is the Present Combination and Its Object, or Purpose?

1. The American Publishers' Association has adopted a net price system for all copyright books published or controlled by any member or members of the association and made an agreement to maintain it. By this agreement the members thereof are to cut off all supply of their copyrighted books to any dealer who fails to maintain the net price of such books as fixed by such association, or, what is the same thing, by its members. In short, this combination fixes the price of copyrighted books published by its members, and the price at which such books are to be sold, both at wholesale and at retail, and agrees not to furnish or sell any of these books to any dealer who fails to maintain such price; that is, demand and exact from the purchaser the price so fixed.

2. Another association, the American Booksellers' Association, assents to this, agrees to co-operate and be bound by such system and arrangement and to aid and assist in carrying it into effect, and to this end agrees not to buy, or keep in stock, or offer for sale, the copyrighted book of any publisher

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who refuses to join the combination and enforce this price system and demand and exact of the customer this price fixed by the combination. Two-thirds of the members of this association govern. If any member fails to live up to the agreement, etc., he may be expelled, and he is not to have books, and all members are "restrained" from supplying books, etc. (See subdivisions 4 and 5 of Exhibit I.) The objects are: (1) To compel the would-be owners and readers of copyrighted books to purchase their books of the members of this combination, made up of two combinations embracing at least 90 per cent. of all publishers and dealers in copyrighted books, at an arbitrary price fixed by the combination, regardless of the actual value of the book as determined by a demand therefor established in a free and open market or the condition of the books. (2) To compel all publishers of and dealers in copyrighted books to come into the combination, submit to and be controlled by it, and sell books at prices fixed by it, regardless of the value of the books, etc., or of the exigencies of the trade and situation of the seller, or be deprived of the privilege of purchasing, owning, and selling such books. In short, such as refuse to come in are to be crippled, or perhaps ruined, in their business. As the combination extends throughout the United States by the very terms of the agreement, interstate commerce is necessarily restrained. A judgment for the complainants in this action will restrain interstate commerce.

If this suit is one to restrain the infringement of a copyright, granted to the complainant and now owned by it, by the doing of any act that constitutes infringement of that right, and defendant has infringed, it is entirely immaterial that the combination [190] described exists, or that complainant is a member thereof, or that its objects are those described. It is no defense to such a trespass upon the complainant's rights that it has violated and is violating the Sherman anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), or some statute of the state of New York. In *General Electric Co. v. Wise*, 119 Fed. 922-924, this court so held, citing cases. This court there said:

"It is difficult to understand how or why a violation of the Sherman anti-trust law by this complainant, if there has been such a

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violation, confers any right on the defendant to infringe this patent. That act points out the penalties for its violation, and it is not understood that such law denies the grantees of patents the protection of the law because they may be violating some statute. However that may be, the evidence falls far short of establishing such a violation by this complainant. The testimony on that subject is squarely contradicted. An individual cannot confiscate the property or property right of a corporation on the ground it has violated that act. *Soda Fountain Co. v. Green* (C. C.) 69 Fed. 333; *Columbia Wire Co. v. Freeman Wire Co.* (C. C.) 71 Fed. 302; *Bement v. Harrow Co.*, 186 U. S. 70, 88-91, 22 Sup. Ct. 747, 46 L. Ed. 1058. *Harrow Co. v. Quick* (C. C.) 67 Fed. 131, cannot be accepted as authority on this question."

See, also, *Strait v. National Harrow Co.* (C. C.) 51 Fed. 819.

But if the complainant has turned over to the combination the fixing of prices, and has entered into the combination described, and becomes a party to the agreement for the purpose described, and is now, through this suit, attempting, as this court holds it is, to enforce such combination agreement in whole or in part, and such agreement is unlawful, because in violation of the act referred to, then this action cannot be maintained. The complainant confessedly is a party to the combination and the agreement, and cannot, if it be illegal, have a standing in a court of equity to enforce any part of it, directly or indirectly. When a complainant comes into court, asking equity, it must come with clean hands, so far as the transaction involved is concerned. If a party, person, or corporation, in attempting to violate the rights of the public and the rights of those persons who will not join in the attempted violation of law, suffers some injury to his property or property rights, which are being used by his consent by those who are thus violating the law, in perpetrating such violation, at the hands of one who is lawfully resisting such attempted injury, he or it cannot, while continuing the illegal acts, have an injunction to enjoin the resisting acts resulting in such injury. Each owner of the copyright of a book has a monopoly of that particular book. Copyrights, like patents, are assignable, and hence a person or a corporation may lawfully become the owner of any number of copyrights or of all the copyrights of books issued by the United States, and it is immaterial that the purpose is to monopolize the whole business of publishing and selling copyrighted books. In such case such person or corporation

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would hold and control all the monopolies for such copyrights of books, and he or it could print and sell, or print and not sell, or refuse to print at all, or refuse to allow others to print or publish. Should he or it print or publish one or more copies of these books, such person or corporation could appoint agents to sell and prescribe and limit their powers. He or it could [191] license one or more persons to sell, and prescribe the terms and conditions of such sale, and limit the price at which same should be sold. Assume that such person or corporation has fixed the price at which such book shall be sold at retail by such agents and licensees, and may restrain a disposition of such books in violation of the conditions, we have no combination or conspiracy. One man cannot combine or conspire. It takes two or more to make a combination or a conspiracy. So an agreement by all holders of copyrights to assign same to one person or corporation is but a sale of their own, and they may take pay in cash, horses, scrap iron, or licenses to sell the copyrighted book, provided they actually sell their copyrights. If the agreement be a mere pretense, however, a mere cover for a combination to violate some statute, then such agreement to sell their copyrights would be void, and the whole combination would be illegal and void. So one person may purchase and own all the hay, oats, or potatoes existing in the country. If he becomes such owner, he may fix the price at which he will sell. Here there is no conspiracy or illegal combination. But if the several owners of such produce combine, and agree that they will fix prices, interfere with and limit interstate commerce, drive all other dealers and owners of similar property who will not join them in their purposes out of business, and deprive them, if possible, of their right to purchase and ship produce from state to state as a part of interstate commerce, we undoubtedly have an illegal combination, and no member of such a conspiracy can enforce in a court of equity any contract or agreement made in execution, in whole or part, of such a conspiracy. It is evident that one may do, in fixing and enforcing prices, and in exacting tribute from the people and restraining interstate commerce, what two or more cannot do

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in pursuance of an agreement or combination. A corporation, on becoming the owner of several patents or of several copyrights, may do all acts under each that the person to whom such rights were originally granted might have done. Having become the owner, it is entitled to the benefits and privileges of the monopolies granted. But all this affords no sanction or support whatever to the doctrine that the several owners of distinct patents, each having a monopoly of his particular patent, or the several owners of distinct copyrights, each having a monopoly of his particular copyright, may combine and conspire as to their patented articles, or as to their copyrights or books published under and protected thereby, to restrain interstate commerce in articles made or produced thereunder. A right or privilege to form such a combination or conspiracy is not embraced or included within the monopoly granted. The monopoly of one patentee cannot be extended and made more of a monopoly by that of another. The grant of an exclusive right to make and vend a certain machine does not include a license to combine and conspire with another having a like exclusive right to restrain trade and commerce between the states in those articles, if made and put on the market, or to conspire not to put them on the market. The right to elect not to make or sell is necessarily included. The right to combine [192] and conspire is not. In any event the so-called Sherman law forbids any and all combinations in restraint of such commerce.

In the case of copyrighted books it is evident that, if the publisher of one or two should demand and exact of the purchaser at retail a grossly unreasonable price, he would sell but few, if any, copies. Others would supply the market, for readers would forego that book, or those books, and find reading matter elsewhere. But when all publishers of and dealers in copyrighted books—and nearly all new books are now copyrighted—combine to exact a fixed, arbitrary price, etc., the readers of books become powerless, if they would read at all, not because of the monopoly granted or sanctioned by the government in granting the copyright, but because of the new monopoly (the conspiracy of monopolists), created by the agreement and combination of these

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monopolists—one that is forbidden and denounced by Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], entitled “An act to protect trade and commerce against unlawful restraints and monopolies.” Section 1 of that act reads:

“Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce amongst the several states, or with foreign nations, is hereby declared to be illegal.”

It is not necessary that the effect necessarily be to restrain trade or commerce. It is sufficient if the combination may have that effect. It seems to this court impossible to hold that this section of the act does not apply to a combination of patentees to restrain trade and commerce in patented articles made under their patents as much as to such a combination made by dealers in other articles of commerce.

In 1 Page on Contracts, p. 698, § 445, after a statement regarding the law as to “Monopoly Contracts concerning Patents,” it is said:

“But if the owners of distinct patents combine to prevent competition in business, and to control the prices of the patented article, such combinations and all contracts for such purposes are as invalid as if the articles were not patented.”

The following cases are cited to sustain the statement: *National Harrow Co. v. Hench*, 83 Fed. 36, 27 C. C. A. 349, 55 U. S. App. 53, 39 L. R. A. 299; *National Harrow Co v. Quick* (C. C.) 67 Fed. 130; *Vulcan Powder Co. v. Powder Co.*, 96 Cal. 510, 30 Pac. 1113, 31 Am. St. Rep. 242; *Game-well, etc., Co. v. Crane*, 160 Mass. 50, 35 N. E. 99, 22 L. R. A. 673, 39 Am. St. Rep. 458.

In 1 State and Federal Control of Persons and Property (Tiedeman) 412-413, it is said:

“But the mere fact that the subject-matter of the monopolistic combination may be patent rights, covering machines employed in the same art or industry, will not protect the combination from the penal provisions of the anti-trust laws. If a corporation or association is formed among manufacturers and patentees of certain articles of kindred character, in order to control the trade and prices of such articles, the combination is nevertheless illegal, although the exclusive manufacture of the goods is guaranteed by letters patent from the United States government.”

At the time of that writing (1900) the author was not aware of the decision in *Bement v. National Harrow Co.*, 186 U. S. 70, 22 [193] Sup. Ct. 747, 46 L. Ed. 1058, which modifies

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some of the cases cited by him, but not in respect to the general doctrine stated.

In *Bement v. Harrow Co.*, *supra*, the court, at page 94, 186 U. S., page 756, 22 Sup. Ct. (46 L. Ed. 1058), plainly intimates that the several owners of several patents may not combine to restrain commerce in their patented articles. It is unnecessary to cite many cases. If *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, and *Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, are to be respected as law and followed in cases where there is no hue and cry against railroads, this combination is illegal as in restraint of interstate commerce. If anything can be found in the prevailing opinion in *John D. Park & Sons Co. v. Wholesale Druggists' Association et al.*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, supporting the contention of the complainant here, it is sufficient to say that this court does not agree with the prevailing opinion or decision in that case, but does agree with the dissenting opinions of Martin, J., and Cullen, C. J., with whom Vann, J., concurred.

The defendants have not infringed and are not threatening to infringe complainant's copyright, nor have they violated any contract. The complainant is seeking to enforce against defendants an unlawful combination agreement, to which such defendants are not parties, and by which they have not consented to be bound to prevent defendants selling books of which they are the absolute owners. The same result on a similar state of facts as to the effect of such notice was reached by the court in *Bobbs-Merrill Co. v. Snellenburg*, 131 Fed. 530.

The defendants are entitled to a decree dismissing the complaint, with costs.

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IN RE HALE.*

(Circuit Court, S. D. New York. June 8, 1905.)

[139 Fed., 496.]

GRAND JURY—POWERS—WITNESSES—REFUSAL TO TESTIFY.—Where, after a witness had refused to testify before a grand jury consider-

*Affirmed by Supreme Court (201 U. S., 43). See p. 874.

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ing supposed infractions of the anti-trust law, the grand jury made a presentment to the court charging the witness with contempt, and the court, after hearing, ordered the witness to answer the questions, and to forthwith produce the papers required, the court's action was equivalent to an express instruction to the grand jury to **investigate the matter referred to in the presentment**, and hence the fact that the grand jury had been previously acting beyond its power was harmless.

WITNESSES—PRIVILEGE—ANTI-TRUST ACT—INQUISITIONS.—An inquisition before a grand jury to determine the existence of supposed violations of the anti-trust act was a "proceeding" within Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 848 [U. S. Comp. St. Supp. 1903, p. 365], providing that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any "proceeding" under several statutes mentioned, including such anti-trust act.

UNREASONABLE SEARCHES—RIGHTS OF AGENT—SUBPENA DUCES TECUM.—A subpoena duces tecum commanding the secretary and treasurer of a corporation supposed to have violated the anti-trust act to testify and give evidence before the grand jury, and to bring with him and produce numerous agreements, letters, telegrams, reports, and other writings, described generically, in effect including all the correspondence and documents of his corporation originating since the date of its organization, to which 19 other named corporations or persons were parties, for the purpose of enabling the district attorney to establish a violation of such act on the part of the witness' principal, constituted an unreasonable search and seizure of papers, prohibited by Const. U. S. Amend. 4.

HABEAS CORPUS—CIRCUIT COURTS—JUDGES—CO-ORDINATE JURISDICTION.—Where a subpoena duces tecum was directed to be issued by a circuit judge, and the witness was committed for contempt for failure to obey the same, he would not be discharged on habeas corpus by another judge of the same court, though the latter was of the opinion that the subpoena authorized an unconstitutional search and seizure of private papers.^a

Henry W. Taft, for complainant.

Elihu Root and *De Lancey Nicoll*, for defendant.

WALLACE, Circuit Judge.

This is a proceeding in habeas corpus to test the legality of the imprisonment of the petitioner, pursuant to an order of the Circuit Court, adjudging him guilty of contempt in

^a Syllabus copyrighted, 1905, by West Publishing Co.

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refusing to produce certain documents and writings and answer certain questions as a witness before the grand jury impaneled in that court. The petitioner was the secretary and treasurer, and also a director, of McAndrews & Forbes Company, a New Jersey corporation, and had been served with a subpoena duces tecum issued out of that court commanding him to testify and give evidence before the grand jury upon the part of the United States of America "in a certain action now pending and undetermined" in that court between the United States of America and the American Tobacco Company and the McAndrews & Forbes [497] Company, and to bring with him and produce numerous agreements, letters, telegrams, reports, and other writings, all of which were described generically, and may for the present purposes be described as including all the correspondence and documents of his corporation originating since the date of its organization, to which 19 other named corporations or persons were parties. He appeared before the grand jury pursuant to the subpoena, and was then asked several questions bearing upon the general inquiry whether there was any agreement, arrangement, or understanding between his corporation and the American Tobacco Company in relation to the trade in licorice affecting the business between several states of the United States. He declined to produce the papers or to answer the questions, stating to the grand jury as a reason for so doing that he had been advised by counsel that he was under no legal obligation to produce the writings, and that the production of the papers or the answers to the questions would tend to criminate him. Thereupon he was informed by the United States attorney that the proceeding was one under the act of Congress to protect trade and commerce against unlawful restraints and monopolies, and it was not proposed to prosecute him or subject him to any penalty or forfeiture on account of anything to which he should testify, or as to which he should produce documentary or other evidence, and that he (the district attorney) offered and assured to him immunity and exemption from any such testimony. The petitioner again declined to answer, for the reasons previously stated. Subsequently the grand jury made a presentment to

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the court charging the petitioner with contempt because of his refusal to produce the writings and give the testimony required, and setting forth fully the facts relating thereto. When this presentment was submitted to the court, the petitioner being present, the court made an order directing him to answer the questions as propounded by the grand jury, and to forthwith produce the papers. Upon his refusal to comply, further proceedings were taken, which resulted in an order by the court adjudging him in contempt, and committing him to the custody of the marshal until he should comply with its previous order.

It is insisted by the petitioner that his imprisonment and restraint are without lawful authority for reasons which may be summarized as follows: (1) That the grand jury could only investigate specific charges against particular persons, and, as there was not any proceeding of that nature before them, and no cause or action of any kind whatever pending in the court, they were not in the exercise of proper authority in prosecuting the investigation when petitioner was before them, and consequently he could not be lawfully required to testify or give evidence; (2) that petitioner was within the protection of the fifth amendment of the Constitution in refusing to testify or produce incriminating evidence against himself; and (3) that the order of the court directing him to produce the papers contravened the fourth amendment of the Constitution, and in fact deprived him of his right to be secure against unreasonable search and seizure of his papers, and was equivalent to a [498] warrant not issued upon probable cause or particularly describing the things to be seized.

It is manifest from the facts recited in the presentment made by the grand jury that the investigation which they were pursuing was not based upon any specific charge which had been formulated and laid before them by the United States attorney, and that it was not founded upon their own knowledge, or upon information derived from any source that a specific offense had been committed by either of the two corporations named in the subpoena. It appears to have been one which they were pursuing, with the assistance of the United States attorney, directed to the dis-

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covery of some infraction by one or both of these corporations of the law of Congress of July 2, 1890, "to protect trade and commerce against unlawful restraints and monopolies," known as the "Anti-Trust Law" (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Consequently the first contention for the petitioner presents the question whether it is within the competency of the grand jury to institute and pursue such an investigation in the exercise of its inquisitorial power.

The authority and functions of a grand jury in the courts of the United States in investigating criminal offenses are not prescribed by statute, but are such as inhere in that body by the general sanction of the common-law courts. That a grand jury is not confined to the investigation of an alleged offense to which their attention has been called by the court, or which has been laid before them in an indictment, or an information by the prosecuting attorney of the court, or which is within the personal knowledge of some of the members, is the generally accepted opinion of the courts of this country, unless in some of the states where there may be statutory restrictions to the contrary. As said by Mr. Justice Brewer in *Frisbie v. The United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657:

"In this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and, after determining that the evidence is sufficient to justify putting the party suspected to trial, to direct the preparation of the formal charge or indictment."

That they may investigate into offenses which may come to their knowledge, other than those to which their attention has been called by the court, or which have been submitted to their consideration by the district attorney, is shown by the observations of Mr. Justice Field in a carefully considered charge to the grand jury in the United States Circuit Court for the District of California. 2 Sawy. 667, Fed. Cas. No. 18255. That a grand jury has certain inquisitorial powers—and by this is meant the power of instituting an investigation to discover whether a particular crime has been committed—is also a proposition which has been frequently affirmed by the courts of this country; but as to the extent and limitation of this power there is

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pronounced divergence of opinion. It will suffice to refer to a few of the many citations which counsel have with great industry collated.

[499] In *Blaney v. The State of Maryland*, 74 Md. 153, 21 Atl. 547, the court said:

"However restricted the functions of grand juries may be elsewhere, we hold that in this state they have plenary inquisitorial powers, and may lawfully press, and upon their own motion originate, charges against offenders, though no preliminary proceeding has been had before a magistrate, and though neither the court nor the state's attorney has laid the matter before them. * * * Though far-reaching and seemingly arbitrary, this power is at all times subordinate to the law, and experience has taught that it is one of the best means to preserve the good order of the commonwealth and to bring the guilty to punishment."

In *Re Lester*, 77 Ga. 143, the Supreme Court, after stating in its opinion that it was undeniable that the powers of the grand jury are to a certain extent inquisitorial, but are to be exercised within well-defined limits, said:

"Anything they can find out upon inquiry and observation is legitimate and praiseworthy, but they have no authority to force private persons or the officers of other courts to disclose to them who have violated the public laws, and the names of persons by whom such infractions can be established; in short, to make any man the spy upon the conduct of his neighbors and associates, and compel him to violate the confidence implied in holding social intercourse with his fellows by forcing him to become a public informer."

Such an exercise of power, the court said, would be in derogation of "rights regarded as sacred and paramount in the intercourse between man and man; and these rights have been carefully guarded, not only by the spirit of our law, but by its express enactment."

In the United States Circuit Court for the District of Tennessee (reported in Wharton on Criminal Pleading, p. 224) Mr. Justice Catron compelled witnesses to answer who had been summoned by the grand jury, when it did not appear that there was any specific charge made against any particular person, and when the questions were whether the witnesses knew of any person or persons in the city of Nashville who had begun, or set on foot, or provided means for a military expedition to the Island of Cuba. He said:

"As all these questions tend fairly and directly to establish some of the offenses made indictable by the act of 1818, and are pertinent to the charge delivered to the grand jury, they may be properly propounded, unless the answers would tend to establish that the witness was himself guilty."

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In *United States v. Kilpatrick* (D. C.) 16 Fed. 765, the court, after proving the practice of the state courts in North Carolina, said:

"Grand juries cannot make inquisitions into the general conduct or private business of their fellow citizens, and hunt up offenses by sending for witnesses to investigate vague accusations founded upon suspicions and indefinite rumors."

He adds:

"The rights of society, as well as the nature of our free institutions, forbids such a dangerous mode of inquisition."

In *Thompson & Merriam on Juries*, § 615, it is said, referring to authorities cited:

[500] "These expressions of opinion bristle with evidence of the inquisitorial power of the grand jury to inquire of their own motion into offenses of every character punishable by the court, of which it is a component part."

The subject is summed up in volume 17, *Am. & Eng. Enc. of Law* (2d Ed.) p. 1279, as follows:

"Although it has been sometimes asserted that at common law the grand jury was charged with inquisitorial duties, and was empowered to institute inquiries and investigations into criminal offenses, according to the weight of authority the power of the grand jury to originate criminal prosecutions otherwise than by a presentment based upon the personal knowledge or observation of the members of that body is ordinarily limited to cases in which individuals have been charged with specific crimes before a magistrate, in which cases the accused has a responsible prosecutor upon the record, who may, if he swear falsely, be indicted for perjury, or to cases which are called to its attention by the court or the prosecuting attorney; and it has no power of its own motion to institute a prosecution by summoning and examining witnesses for the purpose of obtaining information upon which to base a presentment of a supposed offender."

The result of the authorities seems to be fairly summarized in the last citation.

The question whether an improper exercise of the inquisitorial power subverts the jurisdiction of the court, or is simply such an irregularity as to enable the accused or a witness to invoke the intervention of the court, or as may vitiate an indictment, has never been decided. Were it not for the implication arising from the treatment of the subject in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, it would seem quite clear that it could not affect the jurisdiction of the court. The grand jury is a part of the court in the exercise of criminal jurisdiction, and their proceedings are always subject to the control of the court.

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The court can at any time direct the grand jury to consider a particular accusation, or to investigate a supposed violation of the criminal law; and whether it does this by direct instructions or by directing the prosecuting officer to present the matter for the consideration of the grand jury is of no consequence. If, in the absence of such instructions, the grand jury proceeds of its own motion, and is guilty of any abuse of its powers, the court can at any time intervene, and correct or suppress the proceedings. If the conduct of the grand jury is called to its attention, and the court approves or disapproves, whether its judgment may be correct or wrong, it is in the exercise of its undoubted jurisdiction; and, though it is erroneous, it is not void or illegal, and cannot be reviewed by habeas corpus. Of course, this is not true in cases where the court transcends its authority. In the Counselman Case, which was a habeas corpus case, the court adverted to the contention that the jury in the particular case had not been "investigating specific charges against particular persons," but said that it was not necessary to intimate any opinion as to the validity of the contention, and placed its decision upon another ground. The circumstance that the point was adverted to is hardly enough to suggest that the court considered it to be a valid one.

[501] In the present case it does not appear that the investigation was initiated sua sponte by the grand jury, and it may be inferred from the participation of the United States attorney in the proceeding that it originated in his formal presentation of the charge to them. The subpoena duces tecum was the process of the court. As it commanded the witnesses to appear before the grand jury, it is manifest that the recital about the pending "action" could only have referred to a proceeding between the United States and the two corporations of the only kind which a grand jury can entertain, viz., a preliminary investigation to ascertain whether there was sufficient cause for an indictment. When, after the presentment of the alleged contumacy of the witness by the grand jury to the court, he was ordered by the court to answer questions and produce the documents, the action of the court was equivalent to an express instruction to the grand jury to investigate the proceedings mentioned

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in the presentment. While the investigation was not directed to a specific offense, it was directed to the inquiry whether one of the laws of the United States—the so-called Anti-Trust Law—had been violated by either or both of the two corporations mentioned. Without this intervention by the court the investigation would have been one upon the border line between the legitimate exercise and the abuse of the inquisitorial power of the grand jury, but not one which can be safely held to have been an ultra judicial proceeding. After the intervention of the court the original abuse of power, if there was any, became innocuous.

The contention for the petitioner that the order of the court violates the constitutional prohibition against compelling a person to give evidence against himself in a criminal case would be clearly sound were it not for the effect of the immunity act of Congress of February 19, 1903, c. 708, 32 Stat. 848 [U. S. Comp. St. Supp. 1903, p. 365]. In view of his official relations with the corporation, it fairly may be assumed that the petitioner had participated personally in some of the acts or transactions which were the alleged offenses of the corporation, and was therefore originally responsible himself. It is not for this court to question the soundness of the judgment in *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, or to weigh the value of the dissenting opinions. That judgment is authoritative that such an exemption from liability to prosecution or penalty as was secured to the witness by the immunity act of February 19, 1903, if it extends to testimony given or compelled before a grand jury, deflects the application of the fifth amendment to the Constitution so that the prohibition against compelling a person to be a witness against himself in a criminal case does not protect him. The petitioner's counsel do not argue otherwise, and their argument is that the immunity given by this act does not extend to testimony given by a witness before a grand jury. The provision is that no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, "in any proceeding, suit, or prosecution" [502] under the several statutes mentioned,

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including the anti-trust act. The argument that a proceeding before a grand jury is not such a proceeding as is meant by the provision has been ingeniously presented, and is not without plausibility. But the word "proceeding" is a broad term, and was apparently intended to include some form of judicial inquiry other than a "suit or prosecution." In one sense it is true a criminal proceeding is not instituted against an accused person until a formal charge is made against him by indictment or information, or a complaint before a magistrate; and proceedings before a grand jury are not, in that sense, a criminal proceeding against an accused. *Post v. United States*, 161 U. S. 583, 16 Sup. Ct. 611, 40 L. Ed. 816. But in another sense any initial step before a judicial tribunal preliminary to the commencement of a civil suit or a criminal prosecution is a proceeding. As used in this statute, inasmuch as testimony given in a suit or prosecution embraces that given not only at the trial, but upon all occasions incident to the controversy, the term "proceeding," if limited to some step in the progress of a civil suit or a criminal prosecution which has been previously instituted, is mere tautology. A rational construction seems to require it to include any preliminary step which is incident to the institution of a civil suit or a criminal prosecution.

The contention that the order requiring the petitioner to produce papers called for by the subpoena duces tecum was made in violation of the petitioner's rights under the fifth amendment to the Constitution, raises the question whether such a general inquisition into his private papers as is permitted by the terms of the subpoena was not such an abuse of judicial process as to amount to an unreasonable search and seizure. As Judge Cooley says in his work on Constitutional Limitations:

"Near in importance to exemptions from an arbitrary control of the person is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers against even the process of the law, except in a few specified cases."

In *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, it was decided that the law of Congress which authorized a court of the United States in revenue cases on motion

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of the government attorney to require a defendant to produce in court his private books, invoices, and papers, and permit the attorney, under the direction of the court, to make examination of the same, and which provided that, if the defendant refused to produce the same, the allegations of the attorney as to their contents specified in his written motion should be taken as confessed, was unconstitutional and void, as being repugnant to the fourth and fifth amendments to the Constitution. The court said:

"It is our opinion, therefore, that a compulsory production of a man's private papers, to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the Constitution, in all cases in which a search or seizure would be, because it is a material ingredient and affects the sole object and purpose of search and seizure."

[503] And the court concluded:

"We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection of the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings."

It will be observed that the statute in that case did not deprive the party of the custody of the books and papers which he was required to produce, and authorized only such an inspection of them as the court might direct. This judgment concludes an inquiry by this court as to the validity of two propositions, and it settles, first, that a subpoena or an order of the court may be the equivalent of a search and seizure within the constitutional provision; and, second, that any search or seizure for the purpose of obtaining incriminating evidence against the party, is an unreasonable one within the meaning of the provision. The judgment would have controlled this case, and would have entitled the petitioner to be discharged, if the evidence sought to be procured could have been used to incriminate the petitioner. Is a search and seizure any the less unreasonable when it compels the official custodian of all the papers of his principal, whose duty it is to keep their privacy inviolable, to produce them in order to incriminate his principal? It may be conceded that his duty to the state and courts is paramount; but is this true when the evidence is not to be used

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against a principal who is under any criminal accusation, or against whom any civil suit is pending, and is only to be used to discover if possibly any ground of accusation can be found against him?

If the petitioner had been ordered to produce a single document or numerous documents in his possession, which were adequately described to enable him to find them, for use as evidence in a pending action, civil or criminal, it seems plain that the order would have been unobjectionable, and such as the courts are daily making. Such was the case of *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860, where the observation was made by the court upon which the government relies.

The petitioner was required to produce a numerous array of documents and papers for the purpose of ascertaining whether they contained anything which would tend to establish the commission of an offense by either of the two corporations; and it is apparent that the object was to enable the government, by inspecting this mass of the private papers and documents of the petitioner's corporation, to find something which might induce the grand jury to find an indictment against his corporation. It is this which gives to the proceeding its color of oppression and the attributes of an unreasonable search and seizure.

The legality of search warrants has been sanctioned on the ground of public necessity, because without them felons and other malefactors would escape detection. But a search warrant for the papers of a suspected party, to be used as evidence against him, was illegal at common law. Archbold, *Criminal Law* (7th Ed.) 141. [504] Because of the obnoxious character of the process, very great particularity is required in designating the articles to be searched for before the officers of the law are permitted to invade the premises where the articles sought are supposed to be. A designation of goods to be searched for as "goods, wares, and merchandise," without more particular description, has been regarded as insufficient, even in the case of goods supposed to be smuggled, where there is usually greater difficulty in giving description, and consequently more latitude should be permitted, than in the case of property stolen. *Sandford v.*

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Nichols, 133 Mass. 286, 7 Am. Dec. 151. Lord Camden, speaking of a warrant not specifying the particular papers, but authorizing the seizure of all the papers of the person named in it, described it as "an execution upon all the party's papers," and said:

"To enter a man's house by virtue of a nameless warrant, in order to produce evidence, is worse than the Spanish Inquisition—a law under which no Englishman would care to live an hour." *Entinck v. Carrington*, 19 State Trials, 1029.

Any process which is issued to perform the office of a search warrant should conform in some remote degree, at least, in certainty and specific description, to the requirements of a valid search warrant. The subpoena issued in this case may possibly meet these requirements, but it is not too much to say that it resembles more nearly a general warrant to search all the private papers of a witness. It falls but little short of being in substance and effect a roving commission, devised by the government to compel a witness to bring before the grand jury a general mass of the private papers of his principal, in order that the prosecuting officer might discover whether at any time during its corporate life the principal had been a party to any act which could afford the basis of a criminal accusation. This was a wanton assault upon the right of privacy, and in my judgment the process, in view of the circumstances under which and the purposes for which it was issued, authorized an unreasonable search and seizure of papers within the spirit and meaning of the fourth amendment.

The conclusions thus indicated would ordinarily lead to an order for the petitioner's discharge, but the order compelling him to produce the papers alluded to in the subpoena was made by one of the judges of this court, and although it was not made under circumstances which afforded an opportunity for deliberate consideration, the manifest impropriety of reversing it indirectly in the same court, held by a different judge, is so great that it ought not to be done if the only result will be to shift the burden of preparing a record for a review by a higher tribunal from the one party to the other. Whether the present decision is in favor of the petitioner or against him, it is understood that it will be taken

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for review to the Supreme Court, and pending that review the petitioner will not be confined.

Under these circumstances an order will be entered refusing the discharge of the petitioner.

[412] CAMORS-McCONNELL COMPANY v. McCONNELL.^a

(Circuit Court, S. D. Alabama. August 31, 1905.)

[140 Fed., 412.]

CONTRACTS—LEGALITY—RESTRAINT OF TRADE.—An agreement, as incidental to the sale of property as a business, that the seller will not enter into a competing business, is valid and enforceable, notwithstanding it is in partial restraint of trade.^b

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 542-545, 555.]

SAME—ILLEGAL PURPOSE OF COVENANTEE.—A contract by which a person sells his property and business good will to another cannot be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business and in pursuance of an illegal combination in restraint of trade.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 462-464, 547.]

SAME.—In order to defeat a suit to enforce a contract on the ground that its enforcement is sought to aid and facilitate the carrying out of an illegal combination in restraint of trade, it must appear that the contract is directly connected with such unlawful purpose, and not merely collateral thereto.

EQUITY—MAXIMS—COMING INTO COURT WITH CLEAN HANDS.—The maxim that one coming into a court of equity must come with clean hands applies only in case of fraud or misconduct on the part of [413] complainant in regard to the transaction which is the subject of controversy.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 185-187.]

SPECIFIC PERFORMANCE—SALE OF BUSINESS—ENJOINING VIOLATION.—A court of equity will enjoin a defendant from violating a contract, clearly shown, by which he deliberately obligated himself for a valuable consideration not to engage in a certain business.

^a Affirmed by Circuit Court of Appeals, Fifth Circuit (140 Fed., 987). See p. 825.

^b Syllabus copyrighted, 1906, by West Publishing Co.

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In Equity. On motion for preliminary injunction.

Howe, Spencer & Cocke and *R. H. & N. R. Clarke*, for complainant.

Gregory L. & H. T. Smith, for defendant.

TOULMIN, District Judge.

The averments as to the facts of this case, as set out in the bill of complaint, are substantially admitted by the defendant, with the exception that he denies that the contract of January 27, 1900 (Exhibit III to the answer), was made upon the terms set out in the contract of December 8, 1899 (Exhibit A to the bill), or that it had any reference to the provisions of said last-named contract, and that the provisions of article 5 therein were for the use, benefit, and protection of the complainant. And defendant avers that at the time the contract of December 8, 1899, was made it was understood that the United Fruit Company was the real party interested in said contract, and that the provisions of article 5 therein were made for its benefit and protection. It does not appear from anything now before the court that the United Fruit Company has ever availed itself of the provisions of article 5, referred to, that any consideration therefor ever passed or was intended to pass from it to the defendant, or that said company ever complained of the violations of said contract by the defendant. The United Fruit Company is not a party to this suit, but it appears that it is a stockholder of the Camors-McConnell Company. I think that on the bill, answer, and evidence, as now presented, there can be no doubt that the contract of December 8, 1899, was made in contemplation of the formation of the corporation of Camors-McConnell Company, and of its adoption by such corporation when organized, and that it was adopted by said corporation, and that the contract of January 27, 1900, transferring the property, effects, business, and good will of Camors, McConnell & Co., was made in pursuance of, and upon the terms set out in, said contract of December 8, 1899, and that the Camors-McConnell Company has performed the obligations thereby assumed by it, and is entitled to all the benefits accruing under said contracts.

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But the defendant contends that the real purpose of the transaction in question was to suppress existing competition between the business conducted by the copartnership of Camors, McConnell & Co. and the United Fruit Company, and to combine said business with corporations and companies confederated together to monopolize and control the business of buying, importing, and selling fruit throughout the United States, and that the contract sought to be enforced is therefore illegal and void. The defendant further contends that the com- [414] plainant and the United Fruit Company are conducting their business in violation of the laws of the United States, and that at the time the contract involved in this suit was made and entered into it was for the purpose of aiding and facilitating the United Fruit Company and the Camors-McConnell Company and other companies in combination with them in conducting their business in violation of the laws of the United States, and that said contract was made in restraint of trade and commerce among the several states and with foreign nations, and for the purpose of forming and maintaining a combination in the form of a trust, and for that reason it is illegal and not enforceable. The covenant here sought to be enforced is that wherein the defendant agreed that he would not, "either individually or by or through a corporation, jointly or severally, directly or indirectly, engage in the growing or importing or selling of tropical fruits, or any other business, directly or indirectly, in competition with the new corporation," the Camors-McConnell Company. The test of the legality and validity of this covenant is whether the main contract is legal. If the contract is illegal, affirmative relief against it will not be granted. No court will lend its assistance in any way towards carrying out the terms of an illegal contract. *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; *Harriman v. Northern Securities Co.*, 197 U. S. 244, 25 Sup. Ct. 493, 49 L. Ed. 739.

A contract may, in a variety of ways, affect interstate commerce, and yet be entirely valid, because the interference produced by the contract is not direct. The fact that trade and commerce might be indirectly affected is not sufficient. The

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effect must be direct and proximate. *Hopkins v. U. S.*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290; *U. S. v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Northern Securities Co. v. U. S.*, 193 U. S. 198, 24 Sup. Ct. 436, 48 L. Ed. 679. The indirect effect of the contract under consideration might be to enhance the price of tropical fruit, but the contract itself would not directly or necessarily for that reason be in restraint of interstate trade or commerce. While it might tend to restrain such trade, the restraint would be an indirect result. In the sale of a going business or concern, with the good will attached, where, as ancillary and incident thereto, the seller enters into a covenant with the buyer that he would not compete with him in any way as to diminish the value of the property or business sold, although such covenant may be in partial restraint of trade, it should be upheld and enforced. *Harrison v. Glucose Sugar Refining Co.*, 116 Fed. 307, 53 C. C. A. 484, 58 L. R. A. 915; *Nat. Enameling & Stamping Co. v. Haberman* (C. C.) 120 Fed. 415. In *U. S. v. Addyston P. & S. Co.*, 85 Fed. 281, 29 C. C. A. 141, 46 L. R. A. 122, the court said:

"Covenants in partial restraint of trade are generally upheld as valid when they are agreements by the seller of property or business not to compete with the buyer in such way as to derogate from the value of the property or business sold."

An agreement, as incidental to a sale of property as a business, that the seller would not enter into a competing business, is valid, notwithstanding it is in restraint of trade to that extent. *A. Booth & Co. v. Davis* (C. C.) 127 Fed. 875; *S. Jarvis Adams Co. v. Knapp*, 121 Fed. 34, 58 C. C. A. 1; *U. S. v. Addyston P. & S. Co.*, *supra*; *Id.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. The sale and transfer by a person of his property and good will to another cannot be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business, and in pursuance of an illegal combination in restraint of trade. *Metcalf v. Am. School Furniture Co.* (C. C.) 122 Fed. 115. In *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, the court said:

"We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade

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and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties." *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 547, 22 Sup. Ct. 431, 46 L. Ed. 679; *Knapp v. S. Jarvis Adams Co.* (C. C. A.) 135 Fed. 1008.

In the case of an unlawful combination of the nature asserted here, the remedy is by well-recognized and direct proceedings. The fact, if it be a fact, that the complainant is one of an association or combination of corporations, which constitutes a monopoly, and that its general business is illegal, as one in restraint of trade, cannot be invoked collaterally to affect in any manner its independent contract obligations or rights. *Yarborough's Adm'r v. Avant*, 66 Ala. 526; *Ware v. Curry*, 67 Ala. 274; *Johnston v. Smith's Adm'r*, 70 Ala. 108. It is held that one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, defend against the contract on the ground of the illegality of the combination. *Harrison v. Glucose Sugar Refining Co.*, *supra*; *Dennehy v. McNulta*, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609.

On the case as now presented, and assuming that there was a combination or agreement between the complainant and other corporations, which was prohibited by law as being in restraint of trade, I think that the contract in controversy between complainant and defendant was collateral to the said unlawful agreement or combination. Moreover, I do not think that the direct or necessary operation of said contract tends to restrain interstate or international trade or commerce, or to create a monopoly therein. My opinion, therefore, is that there is nothing illegal in the consideration and performance of said contract, and that the defendant should not be permitted to repudiate it because the association of complainant with other corporations is illegal.

But it is urged on the part of the defendant that, even if the contract in controversy was, as a separate and independent contract, a lawful one, it was a part of an unlawful scheme to monopolize interstate trade and commerce in tropical fruit, and it thereby became unlawful. It is true there are some cases in which courts have held that even the

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fact that a contract is one for the sale of property or of business and good will has not saved its validity, if it was shown that it [416] was only a part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. It was held that in those cases the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. *U. S. v. Addyston P. & S. Co., supra.* I think it will be found that the cases referred to were direct proceedings against the alleged monopolies wherein it was sought to enjoin them. There are no provisions in the contract here sought to be enforced which refer to the restrictions of trade, or to the regulation of the importation, sale, and prices of fruit, evidencing an intent to establish a monopoly in such trade.

In the case of *Swift & Co. v. U. S.*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, a bill was filed by the United States to enjoin the defendants' commission of alleged violations of the law "to protect trade and commerce against unlawful restraint and monopolies." It charged a combination of a dominant proportion of the dealers in fresh meats throughout the United States to do and not to do certain specified things, with the intent to restrain competition among themselves, and to monopolize the supply and distribution of fresh meats throughout the United States. The case was submitted on bill and demurrer thereto. The court said it seemed to them "that this allegation of intent colored and applied to all the specific charges of the bill, and intended to allege successive elements of a single connected scheme." In the course of the opinion the court further said:

"The constituent elements are enough to give to the scheme a body. * * * Moreover, whatever we may think of them separately, when we take them as distinct charges, they are sufficient as elements of a scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent, for instance, the monopoly, * * * an intent to bring it to pass is necessary in order to produce a dangerous probability that will happen. But, when that

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intent and the consequent dangerous probability exist, the statute * * * directs itself against the dangerous probability, as well as against the completed result. The charge is not of a single agreement, but a course of conduct intended to be continued. Under the act it is the duty of the court, when applied to, to stop the conduct. * * * The most innocent and constitutionally protected of acts or omissions may be a step in a criminal plot, and, if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law." 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

As I understand these expressions of the court, they amount simply to a declaration that conduct agreed upon to effect an unlawful object may be unlawful, and that the court, when applied to in a direct proceeding therefor, will stop such conduct by injunction, as well as punish, in proper criminal proceedings, the unlawful act when completed, notwithstanding it may have been accomplished by separate acts ever so innocent in themselves. Being steps in a criminal plot or scheme, bound together by a common intent, their innocence [417] is not sufficient to prevent the punishment of the completed act. I do not think the decision in the Swift Case has any application to this proceeding.

The defendant further claims that the complainant has entered into a combination with various other importers of fruit for the purpose of acquiring a monopoly in the importation and sale of the same, and that the contract in question was to aid and facilitate that purpose, and he insists that the court should for that reason refuse to enforce such contract, and he invokes the maxim that he who comes into a court of equity must do so with clean hands. The combination referred to may be an unlawful one, but the proposition that the defendant, while violating a contract made with the complainant, is entitled to defeat a suit brought to enforce such contract, because the complainant is carrying on its business in an unlawful manner as a monopoly, seems to me to be unwarranted. If the complainant had brought suit against the defendant for a breach of contract, or violation of its alleged rights founded upon the combination, then it might be pertinent to inquire into the character of the combination, and ascertain whether the court would enforce any rights growing out of it. *Strait v. Harrow Co.* (C. C.) 51 Fed. 819; *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 53 Fed. 598, 3 C. C. A. 605. Whenever it is

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necessary for the plaintiff to prove an unlawful combination or agreement in order to recover, no recovery or relief can be had. A contract connected with and growing out of an illegal act cannot be enforced. *McMullan v. Hoffman* (C. C.) 69 Fed. 515. Such, in my opinion, is not the case at bar as now presented. "The rule that one coming into a court of equity must come with clean hands is confined to the conduct of the party in the matter before the court, and not to matters aliunde. Courts will not refuse redress to the suitor because his conduct in other matters, not then before the court, may not be blameless. It is enough, if the suitor shows he has acted justly, fairly, and legally in the subject-matter of the suit." "The iniquity must have been done in regard to the defendant himself, and must have been done in regard to the matter in litigation." *Bonsack-Mach. Co. v. Smith* (C. C.) 70 Fed. 386, and authorities therein cited; *Liverpool & L. & G. Ins. Co. v. Clunie* (C. C.) 88 Fed. 160; *Knapp v. S. Jarvis Adams Co.* (C. C. A.) 135 Fed. 1008.

The maxim of equity to which defendant refers contemplates some fraud or misconduct on the part of complainant in regard to the transaction which is the subject of controversy. "It must be evil practice or wrong conduct in the particular matter or transaction in respect to which judicial protection or redress is sought." Authorities *supra*; 1 Pom. Eq. Jur. 399. "It is well settled that the granting of a provisional injunction rests in the sound discretion of the trial court, and that it is not necessary that the court should, before granting it, be satisfied from the evidence before it that the plaintiff will certainly prevail upon the final hearing of the cause. On the contrary, 'a probable right and a probable danger that such right will be defeated, without the special interposition of the court,' is all that need be shown as a [418] basis for such an order." *Sanitary Reduction Works v. California Reduction Co.* (C. C.) 94 Fed. 693; *Georgia v. Brailsford*, 2 Dall. 402, 1 L. Ed. 433; 1 High on Inj. p. 4. "If there is one thing more than another which is essential to the trade and commerce of this country, it is the inviolability of contracts deliberately entered into, and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit

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of it, and then to repudiate it and the obligation which he has undertaken, is *prima facie*, at all events, contrary to the interests of any and every country." "In all such cases" as that now before the court "courts have uniformly enjoined the delinquent party from engaging in the business from which he has agreed to refrain, and from disclosing the secrets of the business which he has thus acquired." *Harrison v. Glucose Sugar Refining Co.*, 116 Fed. 310, 53 C. C. A. 484, 58 L. R. A. 915, and authorities therein cited.

I am of opinion that the complainant is entitled to the injunction restraining H. L. McConnell from a breach of his contract with the complainant as set out in the bill of complaint, and an injunction will be issued in accordance with the prayer of said bill, except as to so much thereof as prays that defendant be enjoined from becoming or remaining a stockholder of the American Banana Company, as to which an injunction is now denied.

Let a decree be entered and a preliminary injunction issue in accordance with the foregoing opinion, on complainant's giving a good and sufficient bond in the sum of \$1,000, conditioned as required by law and rules of court.

[1987] McCONNELL v. CAMORS-McCONNELL CO.

(Circuit Court of Appeals Fifth Circuit. October 30, 1905. On Rehearing, February 6, 1906.)

[140 Fed.. 987.]

Appeal from the Circuit Court of the United States for the Southern District of Alabama.

For opinion below, see 140 Fed. 412. [See p. 817.]

Gregory L. Smith and *Harry T. Smith*, for appellant.

W. B. Spencer and *R. H. Clarke*, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

PER CURIAM. Without examining this case now as to its merits, the court has concluded that it is not advisable or

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proper to interfere with the discretion of the trial court in the granting of the temporary injunction. Adhering to the construction we have heretofore given the act allowing appeals in such cases, we affirm the judgment of the Circuit Court. *Lehman v. Graham*, 135 Fed. 39, 67 C. C. A. 513; *Railroad Comm. v. Rosenbaum*, 130 Fed. 110, 64 C. C. A. 444; *Kerr v. New Orleans*, 126 Fed. 920, 61 C. C. A. 450; *Massie v. Buck*, 128 Fed. 27, 62 C. C. A. 535.

ON PETITION FOR REHEARING.

The judges who concurred in our former decree are still satisfied therewith, and the petition for rehearing is denied.

[923] AMERICAN BRAKE BEAM CO. v. PUNGS.

(Circuit Court of Appeals, Seventh Circuit. January 20, 1905.)

[141 Fed. 923.]

CONTRACTS—LEGALITY—RESTRAINT OF TRADE.—A contract recited that plaintiff, who was the patentee of an invention relating to brake beams, for the consideration of \$10,000 to be paid him, had assigned to defendant, which was a corporation engaged in the manufacture of brake-beams, a certain patent and a pending application for a second and provided that plaintiff during the life of the patent should not become connected with any company manufacturing or selling brake-beams in the United States either as officer, employé or shareholder but reserved to him the right to terminate such part of the contract at any time by refunding the consideration paid him by defendant. *Held*, that such agreement to remain out of the brake-beam business did not render the contract unlawful as one in restraint of trade and competition or creating a monopoly and that plaintiff could maintain an action thereon to recover the stipulated consideration.

[Ed. Note.—For cases in point see vol. 11, Cent. Dig. Contracts, §§ 550-553.]

In Error to the Circuit Court of the United States for the Northern Division of the District of Illinois.

The action in the Circuit Court was on a written agreement between Pungs and the Brake Beam Company, wherein the Brake Beam Com-

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pany, for certain considerations therein named, agreed to pay Pungs the sum of ten thousand dollars, credit being given for two thousand five hundred dollars already paid.

The defense was the general issue, with notice of special defenses.

At the trial, on motion of the plaintiff, a verdict for the plaintiff for the sum of nine thousand, one hundred and thirty-five dollars, and forty-one cents was returned; and on this verdict, after motion for new trial was overruled, judgment was entered. Upon the refusal of the court to grant a new trial; upon the court's direction to the jury to return a verdict for the plaintiff; and upon the exclusion of certain evidence offered on the trial by defendant, the principal errors complained of are assigned.

The evidence showed, that beginning in 1886 as an inventor, and 1887 as a manufacturer, Pungs was in the metallic brake-beam business until 1892, when with others, he organized the American Brake Beam Company, which took over, along with other companies, his previous company. Of the American Brake Beam Company, Pungs was a stockholder and the manager until 1894, when selling his stock to Henry D. Laughlin, the latter became general manager of the company. Until 1897, however, Pungs remained in the employ of the company, superintending its business at Detroit, Michigan. On this latter date he was discharged.

January 19th, 1899, one of the contracts sued upon was executed in writing as follows:

"An agreement between Wm. A. Pungs of the city of Detroit, in the state of Michigan, and the American Brake Beam Co., a corporation under the laws of the state of Illinois, whose chief or home office is in the city of Waukegan, in said state.

[924] Witnesseth: In consideration of the mutual agreements of the parties, as herein expressed, they agree as follows:

"1st: Under the date of June 28th, 1898, letters patent No. 606,298 were issued from the patent office of the United States to said Pungs, covering the brake beam therein described. His application for a patent on another brake beam has been allowed by the patent office, as per notice to him from Thomas S. Sprague & Son, dated Nov. 12th, 1898, and hereto attached. This latter patent, Pungs will cause to be issued to himself or the Brake Beam Co., as his assignee, as may be agreed.

"2nd: Both these patents said Pungs sells to said Company, and he will assign them in due form, and also will assign to the Company all such letters patent as may be hereafter granted to him on any metallic brake beam or any part relating to a brake beam, and will enter into a written contract with the Company not to engage in a brake beam business in any way, shape or form, and not to be connected with any company manufacturing or selling brake beams, either as officer employé or shareholder (the Chicago Railway Equipment Company alone excepted), all for the price and sum of Ten Thousand Dollars (\$10,000.00) to be paid to him by said Brake Beam Company in four

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equal installments of \$2,500.00 each, the first payable three months after the date hereof, the second in six months, the third in nine months, and the fourth in twelve months after said date; such stay-out contract to cover the period covered by said letters patent No. 606,298, and to be coextensive with the country. But he shall be given the right in said contract to at any time terminate it by refunding to said Brake Beam Company, its successors or assigns, said sum of Ten Thousand Dollars (\$10,000.00).

"3rd: In the event said Pungs at any time prior to the expiration of the term covered by said letters patent, that is to say, at any time prior to June 28th, 1915, becomes an officer, agent or shareholder in any company or corporation manufacturing or selling metallic brake beams of any type whatever, or engages in the business himself, that in that case his so doing shall be construed as an election on his part to refund to said Brake Beam Company the said sum of Ten Thousand Dollars (\$10,000.00), forthwith, and he covenants and agrees so to do.

"4th: This contract is in no way to affect the representative claims of the parties against each other and shall not be so treated, the deal covered by it being independent and alone.

"March 22nd, 1899, a supplemental contract in writing was executed as follows:

"An agreement between William A. Pungs of the city of Detroit, the state of Michigan, and the American Brake Beam Company, a corporation under the laws of the state of Illinois, whose chief office is in the city of Waukegan in said state.

Witnesseth:

"In consideration of the mutual agreements of the parties as herein expressed, they agree as follows:

"1st: Since the execution of the contract between the parties, dated January 19th, 1899, said Pungs has transferred to said Brake Beam Company letters patent of the United States No. 606,298 referred to in the 1st paragraph of said contract, and has also executed an assignment to said Brake Beam Company of his pending application for another patent on brake beams, which is also referred to in said 1st paragraph, and will without delay, cause the letters patent covering his said application to be forthwith issued to said Brake Beam Company, as assignee of himself, and to be duly delivered to the Company.

"2nd. As contemplated in the said second paragraph of said contract of January 19, said Pungs now enters into this written contract with said Company, and by it covenants and agrees that he will not engage in the brake beam business in any way, shape or form at any place within the United States of America, its territories, or the District of Columbia and that he will not be connected with any company manufacturing or selling brake beams in the United States, either as officer, employé, or shareholder (the Chicago Railway Equipment Company alone excepted), at any time during the period covered by said letters patent No. 606,298. Said Pungs reserves the right, however, to at any time terminate this contract, and thus to relieve him-

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self of his stay-out [925] obligation, by refunding to said Brake Beam Company, its successors or assigns, the sum of Ten Thousand Dollars (\$10,000,000), which is the price to be paid him by said company for said letters patent, and his stay-out obligations, as hereinafter more clearly expressed.

3rd: For the letters patent as aforesaid and the stay-out obligation aforesaid, said Brake Beam Company covenants and agrees to pay to said Pungs the sum of Ten Thousand Dollars (\$10,000) in four equal installments of twenty-five hundred dollars (\$2,500) each, the first installment to be payable on the 19th day of April A. D. 1899; the second on the 19th day of July, the third on the 19th day of October, 1899, and the fourth and last on the 19th day of January, 1900.

4th: In the event said Pungs at any time prior to the expiration of the term covered by said letters patent, that is to say, at any time prior to June 28, 1915, becomes an officer, agent or shareholder in any company or corporation manufacturing or selling metallic brake beams of any type whatever, or engages in the business himself, then and in that case his so doing shall be construed as an election on his part to refund to said Brake Beam Company said sum of Ten Thousand Dollars (\$10,000) forthwith, and he covenants and agrees so to do.

On these contracts, twenty-five hundred dollars, and no more, have been paid. The suit was for the balance. Further facts are stated in the opinion.

Harry P. Weber, for plaintiff in error.

Dwight C. Rexford, for defendant in error.

GROSSCUP, Circuit Judge, after stating the facts, delivered the opinion of the court. The contract, upon which suit was brought, obligated the Brake Beam Company to pay an indivisible sum, ten thousand dollars. The consideration was the conveyance to the Brake Beam Company of certain inventions patented and to be patented; as also an agreement, that during the period to be covered by certain of the letters patent, Pungs would not engage in the brake beam business in any place within the United States, or be connected with any company engaged in such business. The contract does not disclose how much of the consideration was for the patents, or how much for the agreement to remain out of business. On the face of the contract, either consideration, assuming that they were both lawful, would sustain the contract, and entitle Pungs to a recovery.

It is not argued that the consideration, so far as it is embodied in the inventions transferred, is not lawful. Par-

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ties may lawfully assign inventions not yet patented, and even future inventions, so far as such future inventions are tributary to the inventions assigned.

But it was insisted that the agreement embodied in the contract to remain out of the brake beam business within the United States for the time named, was an attempt to illegally restrain trade, to illegally restrict competition, and to create a monopoly; and was, therefore, an unlawful consideration; and evidence was offered tending to show that though the assignment of the inventions was stated to be a part of the consideration, the sole real consideration, as understood between the parties at the time, was this agreement to remain out of the brake beam business. This evidence was excluded. Evidence, also, was offered tending to show that the inventions were without commercial or practical value. But independently of its probative weight on the issue whether the agreement to remain out of business was or was not the sole real consideration, such evidence clearly would have been immaterial.

[926] The first question thus presented is this: Is the agreement to remain out a consideration that invalidates the contract? If the contract is not thus invalidated, the entire case made by plaintiff in error fails.

It will be noted that Pungs actually transferred the patents, so that the contract in this respect was already executed; also, that the period he was to remain out of the brake beam business was just the period the transferee was to have the benefit of the patents transferred; and, further, that Pungs was at liberty, at any time during the period named, to return to the brake beam business upon refunding the ten thousand dollars paid him.

We do not look on this as a contract in restraint of trade. It binds no one to stay out of the trade. At most, it is an agreement, merely, that if Pungs renews his connection with the trade, he shall return the consideration received by him for the patents transferred. Pungs, personally, was not a manufacturer of brake beams. He was in no true sense a dealer or competitor, commercially, in that business. His connection with the business was that of inventor chiefly; and the agreement under consideration may be considered as an

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incident, only, to the commercialization of his invention. Even in this he has put no mortgage on his inventive faculties. He has merely put himself where, without putting any binding restraint on his inventive faculties, or for that matter, upon his liberty as a manufacturer, he will realize, for the time being, on what he has already invented, the largest commercial return.

This is not, in our judgment, restraint of trade. The question whether a given contract is restraint of trade depends as much upon the nature of the business said to be restrained as upon the more commonly mentioned elements of time and place. *Harrison v. Glucose Refining Company*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915. The nature of the contract under consideration comes plainly within the principles of that case, and of *Morse, etc., Company v. Morse*, 103 Mass. 73, 4 Am. Rep. 513, and other cases.

In the view thus taken of this question, the other questions raised and discussed become immaterial. The judgment of the Circuit Court is affirmed.

[176] UNITED STATES *v.* ATCHISON, T. & S. F. RY. CO.

(Circuit Court, W. D. Missouri, W. D. December 4, 1905.)

[142 Fed., 176.]

INJUNCTION—VIOLATION—CONTEMPT—INFORMATION.—An information for contempt at the relation of the United States against a railroad company for violation of a temporary injunction restraining it from granting rebates is criminal in character. In such proceeding the defendant is entitled to every reasonable doubt as to the obligatory force of the mandate, and whether its disobedience was willful.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 514.]

SAME.—If the court issuing the injunction alleged to have been violated had no jurisdiction of the subject-matter of relief prayed for in the bill, the restraining order was void, and no contempt could be predicated of its disregard.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 439.]

CARRIERS—JURISDICTION—ENJOINING GRANT OF REBATES.—Prior to the enactment by Congress of the Elkins act (Act Feb. 19, 1903, c. 708,

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32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), a United States Circuit Court had no jurisdiction in equity over a suit instituted by direction of the Attorney General of the United States to enjoin a railroad company from granting rebates under the interstate commerce law, especially where no order had hitherto been made by the interstate commerce commission on the railroad company to discontinue the forbidden act.

SAME.—The interstate commerce act and the act known as the "Sherman Anti-Trust Law" are separate and independent acts, not germane in character and purpose; and therefore jurisdiction in the Circuit Court of the [177] United States over a bill in equity to enjoin a railroad company from granting rebates to favored shippers cannot be maintained upon the ground that such act of the railroad company is a monopoly within the meaning of the second section of said anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

STATUTES—CONSTRUCTIVE PROSPECTIVE OPERATION.—Statutes are presumed to be prospective in operation, and the courts refuse to give a retroactive effect to statutes, unless the intention is so clear and positive as by no reasonable possibility to admit of other construction.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 344.]

SAME.—The doctrine of relation, like every other fiction of the law, has its limitations. It can never be applied where its root was not planted in an antecedent lawful right.

INJUNCTION—ENJOINING GRANT OF REBATES—VIOLATION—VOID ORDER—CONTEMPT.—A suit in equity instituted by the Attorney General of the United States to enjoin a railroad company from granting rebates, and a restraining order made thereon in March, 1902, were not validated by the enactment of the Elkins act in February, 1903 (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]). *Held*, further, that if the suit could have been continued under the Elkins act, where the antecedent offense of the railroad company was being continued after February 19, 1903, an action by the United States attorney in the summary method authorized by the latter act would have presented an issue of fact entitling the defendant to a hearing thereon; and any injunction granted would be as to violations of law then being committed, but would not have the effect to vitalize an antecedent injunctive order granted by the court when it had no jurisdiction to make it. *Held*, further, that where no such action was taken by the United States attorney after the passage of the Elkins act, an information for contempt filed by him, based on a violation of such void order, has not the effect to bring it within the operation of the Elkins act.

SAME—CONSTRUCTION OF ORDER—CONTEMPT.—Where the bill for an injunction against a railroad company, at the relation of the United States attorney, for granting rebates, in its specifications describes

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only grain and packing-house products of meat on which rebates were being granted, followed by a general allegation that the defendant was likewise granting rebates on other necessities of life, the subjects of interstate traffic, etc., and the injunctive order specifically enjoined the granting of rebates on the specified articles of traffic "or any other interstate traffic," *held*, that the latter general term, on the rule of "*ejusdem generis*" and "*noscitur a sociis*," is controlled by the antecedent particularization, and is limited to objects of like kind with those specified; and therefore an information for contempt, predicated of alleged rebates granted by the defendant a year or so afterwards in another jurisdiction on the commodities of salt and coal, could not be sustained under such limited restraining order.

CARRIERS—REBATES—TRAFFIC RATES—DIVISION.—Where a short line railroad, chartered by the state, authorized to haul freights for hire, is owned by stockholders common to said short road and the shipper, and a long distance railroad connecting therewith enters into a joint traffic arrangement with it for the transportation of interstate traffic, and the two roads file and publish such joint rates, as required by the Interstate Commerce law, and live up to the same—*Quere*: Can an information by the United States attorney against the interstate carrier [178] for granting rebates to such shipper be sustained on evidence tending to show that the division of the through rate is grossly disproportioned to the haul over such short line?

(Syllabus by the Court.)

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This is a proceeding for contempt, growing out of a temporary restraining order made by this court on March 25, 1902. The restraining order was predicated upon a bill of complaint in equity filed by the United States attorney for this district, under direction of the Attorney General of the United States, against the defendant railroad company. The bill recited that the action was taken on the request of the Interstate Commerce Commission. It charged that the defendant railroad company, a corporation of the state of Kansas, was engaged in the transportation of interstate commerce; that in conformity to the requirements of the interstate commerce act of congress it had filed with the Interstate Commerce Commission at Washington City a copy of schedule of rates and charges established and published by it for the transportation of freight traffic; among other things on cured meats, known as "packing-house products," and also on dressed meats, for transporting the same from Kansas City, Mo., and Kansas City, Kan., across the states of Missouri, Iowa, and Illinois, to the city of Chicago, Ill., and other points known as "Chicago common points"; that these were the only lawful rates for transporting such commodities between said points prior to January, 1902, to the time of the institution of the suit. That notwithstanding its duty to ship at no greater or less rate in that regard, the defendant, combining and confederating with certain persons, to the orator unknown, to create a monopoly in the transpor-

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tation of said commodities on defendant's line of railway between the points aforesaid, early in the year 1901, entered into an agreement or agreements with the persons unknown to transport such commodities between such points at rates much less than the published, established rates on said commodities. It is then charged that in pursuance of said combination the defendant transported such packing-house products from Kansas City, Mo., to Chicago and Chicago common points, billing the same at the established rate therefor, but in pursuance of said unlawful agreement rebating to such unknown persons the difference between the rate agreed upon and the established rate, and transported such traffic at less than schedule rates. In paragraphs 5 and 6 the bill charges that prior to the 1st day of January, 1901, the defendant filed with the Interstate Commerce Commission its schedule of rates established jointly with connecting railways, for the transportation of grain from Mississippi river points to New York and New York common points, and from Kansas City, Mo., to the Mississippi river points aforesaid, and to Chicago and Chicago common points. These paragraphs refer exclusively to grain and its transportation between the points specified. The seventh paragraph then charges that the defendant granted to certain favored grain buyers and shippers, whose names are unknown, who shipped wheat, corn, and other grain over the defendant's line between the points aforesaid, large concessions and rebates from its published and established schedules, whereby such shippers obtained from the defendant unlawful rebates in respect to such shipments on grain between the points aforesaid. There is no charge in this paragraph of any combination or monopoly; it is simply a charge for carrying grain for certain shippers below the schedule rates. The ninth paragraph charges that during the period complained of shippers could not, at the points of origin, without ruinous loss, purchase at market prices and pay transportation to eastern destination at the said published and established rates. This charge refers to "said commodities"; but does not specify packing-house products, dressed meats, or grain. The bill prayed for special and general injunctions against the defendant.

A temporary restraining order was granted and set for the 23d day of June, 1902, for further hearing. It recited that until that date, or the further order of the court, the defendant, its officers, agents, and servants, be enjoined and restrained from further acting under and enforcing, or executing in any manner whatever, any agreement to transport over the defendant's [179] railroad, or any part thereof, between the states, any packing-house products, dressed meats, grain, or the products of grain, or any other interstate traffic, at any greater or less rate than the rates named for such services in defendant's established schedule in force on its lines, and at the time said traffic is transported on file with the Interstate Commerce Commission, or from departing from their schedule rates in carrying any of said above products or traffic between the states, and enjoining them from hereafter agreeing with any shipper or other person to transport such traffic at any other or different rates than such as may be provided for in its schedules as filed and published; and enjoining them from paying any rebates, or making any concessions whatever in defendant's rates and charges whereby any such traffic transported by said defendant over its railroad, or in respect to any traffic in the transportation of which said defendant may participate, shall be carried by it at any rate different from the established rate at the time such traffic shall be transported, "without prejudice to the right of the defendant to move at any time to vacate this order upon such ground as it may be advised, and no ground shall be

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deemed waived by reason of defendant not having presented them in opposition to this application."

On June 2, 1902, the defendant filed demurrer to the bill on the following grounds: (1) That the complainant does not state any such cause as ought, in a court of equity, to entitle the complainant to any such relief as prayed for; that the bill does not contain any matter of equity, on account of which this court could grant any decree, or give the complainant any relief against the defendant. (2) That the court has no jurisdiction to hear and determine the action; and that the court, as a court of equity, cannot take cognizance of the matters set forth in the bill, and has no power or jurisdiction to hear or determine the same. (3) That as to so much of the bill as seeks a general injunction restraining the defendant from hereafter agreeing to pay rebates, or transporting at less than the published tariff, the court has no jurisdiction to hear and determine this action, and no power to issue any general injunction as prayed for in the bill. This demurrer was not heard until some time during the early part of 1903; and on May 8, 1903, the demurrer was overruled; and leave was given to the defendant to file answer to the bill within 30 days; and in the meantime the temporary restraining order was continued in force until the further order of the court.

On May 25, 1903, the defendant filed answer, taking issue on the allegations of the bill respecting any combination or confederation with other persons to transport such commodities between such points at less than the published rates; or that in pursuance of any such unlawful agreement it rebated or refunded, or paid back to the shippers, the difference between the established rates and the amount alleged to have been agreed upon, or that it transported such traffic at less compensation than that specified in the published rates, or that it in any instance departed from the established rates; or that it granted to favored shippers, or any other shippers, lower or different rates than those named in its lawful published schedule or rates on any traffic. It also denied any intent or ultimate purpose to continue in the future to transport traffic nominally at its published rates and charges, and subsequently by unlawful rebates or concessions to depart therefrom. The answer also denied that the complainant was entitled to any relief in a court of equity. No further action was taken on these issues other than the appointment of an examiner to take testimony, and no testimony has been taken.

On the 19th day of August, 1905, the complainant, the United States of America, filed in this court an information, charging the defendant with the violation of said restraining order, in that between the 26th day of March, 1902, and the 1st day of January, 1904, in violation of the interstate commerce law, and contrary to the rates of traffic established in its published schedules, etc., the defendant, its officers, agents, and servants, wrongfully and knowingly violated and disregarded said temporary restraining order, in that it carried on its line of road between and among the states and between certain states and territories of the United States, salt at a different and less rate than that named and specified in its published schedules of rates, and more particularly for the Hutchinson-Kansas Salt Company, a Kansas cor- [180] poration. The information charged that the Hutchinson-Kansas Salt Company was engaged in the business of manufacturing salt at Hutchinson, in the state of Kansas, and of transporting and selling the same at all points along the Missouri river and more particularly in the states of Kansas, Missouri, and Nebraska; that the said Hutchinson-Kansas Salt Company owned and controlled numerous salt wells in said territory, and numerous mills for the manufacture of salt, about nine in number, the largest of which said

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mills so owned by said salt company was known as the "Morton Mill"; that the tracks of the defendant company ran on one side of said mill, and the tracks of the Chicago, Rock Island & Pacific Railway Company ran on the other side thereof, and that there are two switches connecting both sides of said mill with the tracks of said railway companies; that there is also in connection with said mill another track known as the "cinder track"; that the entire length of these switches and sidings is less than a mile in length, and were originally constructed by the said Hutchinson-Kansas Salt Company for the purpose of connecting said large mill known as the "Morton Mill" with both of said railway systems; that said switches, etc., were owned and maintained by said salt company, and that no switching charges of any character were charged to any railroad corporation for the use thereof in the transportation of the product of said mills; that in July, 1902, a certain railroad corporation was organized known as the "Hutchinson & Arkansas River Railroad Company" by the officers and stockholders of the salt company; that the salt company pretended to sell and did convey said switches to said last-named railroad corporation; that for the purpose of evading the temporary restraining order heretofore referred to, and in violation of the terms thereof, the defendant made pretended joint tariffs and schedules with the Hutchinson & Arkansas River Railroad Company; that the agreement as to such joint tariffs while nominally made with the Hutchinson & Arkansas River Railroad Company was, in truth and in fact, an agreement made and entered into with the Hutchinson-Kansas Salt Company, whereby the salt company was to receive rebates and concessions upon the transportation of salt from said city of Hutchinson, in the state of Kansas, to points upon the Missouri river. The information then sets out the manner in which this was accomplished. It is then charged that in pursuance of such understanding the defendant on or about the 1st day of August, 1902, published and filed with the Interstate Commerce Commission a joint tariff agreement with the Hutchinson & Arkansas River Railroad Company, showing the rates on salt from Hutchinson to the points aforesaid; and that between the 1st day of August, 1902, and the 1st day of January, 1904, the defendant, from time to time, carried and transported for said salt company as aforesaid, for use in the manufacture of packing-house products at the points aforesaid, and as such business was performed made settlements with the Hutchinson-Kansas Salt Company, in which the defendant paid to the salt company 25 per cent. of said joint tariff rate on all salt so transported, to the extent of many thousands of dollars; all of which, the information charges, appears from evidence taken before the Interstate Commerce Commission at hearings in Hutchinson, Kan., and Chicago, Ill., on the 5th and 22d days of December, 1903, which evidence is filed as an exhibit with the information. The information further charges that between the 1st day of August, 1902, and the 1st day of January, 1904, there were, in the city of Hutchinson and its immediate vicinity, other persons, whose names are unknown, engaged in the business of manufacturing salt, and selling and shipping the same to Missouri river points over the line of the defendant; that such persons were compelled and required by the defendant to pay the full freight rates and charges named in the published and established schedules, whereby the defendant unlawfully discriminated against such other persons in favor of the Hutchinson-Kansas Salt Company.

On September 16, 1905, the defendant filed motion to quash the information upon the ground that the bill of complaint, on which the restraining order was issued, which complained only of alleged violations of the interstate commerce law, in respect of the transportation of certain commodities prior to the filing of the bill, was not

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predicated upon any lawful order or requirement of the interstate commerce commission; that at the time of filing the com- [181] plaint and the issuing of the restraining order this court was without jurisdiction or authority to entertain said bill, or to make said restraining order; that no amendment to said bill was filed by the complainant against the defendant alleging or showing any violation of the provisions of the interstate commerce law by defendant in respect to any alleged departures from its published tariff rates in favor of any shippers after the passage of an amendment to said interstate commerce law known as the "Elkins Act," approved February 19, 1903 (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), which said act for the first time gave this court jurisdiction to entertain bills of complaint on behalf of the United States against railway companies to restrain them from giving to any shipper a less rate than that contained in its published schedules. And, further, that the court was without jurisdiction after the passage of the said Elkins act to issue any injunction covering the acts complained of in the information filed herein, for the reason that under said act and section 16 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), the defendant could be proceeded against in equity only in the jurisdiction where it had its principal office, or in which the act complained of was committed, and there is no allegation in the original bill filed herein, or in the information, that the defendant had its principal office within this judicial district, or that the act complained of was committed either in whole or in part within said district; but, on the contrary, the bill and information allege that the defendant is a corporation of the state of Kansas, and the information avers that the act complained of was committed wholly within said state; and hence not within this judicial district. And further, that in the bill of complaint the only specific charge made against the defendant with regard to departure from its published rates in favor of particular shippers, was in respect to rates concerning the transportation of grain and packing-house products over its lines; and no charge was made concerning the transportation of salt, or a departure from the published rates thereon; that said bill was wholly insufficient to warrant the issuing of a restraining order in respect of rates concerning the transportation of salt; and that the restraining order in respect of any other commodities than grain or packing-house products was unwarranted. And further, that it does not appear from the information that in the transportation of salt from Hutchinson, Kan., the defendant violated the terms of said restraining order; but on the contrary it appears that the traffic mentioned was transported under the rate specified in its published tariffs or on joint published tariffs, to which this defendant was a party, and which were duly published and filed with the Interstate Commerce Commission, and that the information is otherwise insufficient and uncertain.

Gardiner Lathrop, for the motion.

M. D. Purdy, Assistant Attorney General, and *A. S. Van Valkenburgh*, United States District Attorney, opposed.

PHILIPS, District Judge (after stating the facts).

The United States having no pecuniary interest in the subject-matter of the original bill of complaint, acting only pro-bono publico, the alleged contempt belongs essentially

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to what is termed "criminal contempts," to vindicate the dignity of the court. *In re Nevitt*, 117 Fed. 448, 458, 54 C. C. A. 622, 632; *Bessette v. Conkey Company*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997. As such the proceeding is to be strictly construed in favor of the personal liberty of the defendant. As it is to vindicate the dignity of the court in compelling respect for its mandate, a judge may best demonstrate his title to respect by according to the accused the benefit of any reasonable doubt in his own mind as to the obligatory force of his command, and whether or not its disobedience was willful. *In re Watts et al.*, 190 U. S. 32, 23 Sup. [182] Ct. 718, 47 L. Ed. 933. If the court issuing the temporary restraining order had no jurisdiction to make it under the bill of complaint, because it was without the power to proceed to final adjudication of the matters embraced in the bill, the order was one which the defendant was under no legal obligation to observe, and could not, therefore, be adjudged in contempt for disregarding it.

In Re Sawyer et al., 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, one Parsons, who claimed to have been elected police judge of Lincoln, Neb., filed a bill in equity in the United States Circuit Court, praying for an injunction to restrain the mayor and councilmen of the city from proceeding further with certain charges against him, or taking any vote on the report of the committee declaring the office of police judge vacant, or appointing any person to fill that office. A temporary restraining order was issued accordingly which the mayor and council failed to obey. They were cited for contempt, found guilty and adjudged to pay a fine, and in default to stand committed to the custody of the marshal. On writ of habeas corpus the jurisdiction of the Circuit Court over the subject-matter was challenged, and consequently its right to issue the injunction. The Supreme Court held that the Circuit Court was without jurisdiction to entertain the bill in equity for an injunction. Mr. Justice Gray quoted from *Elliott v. Peirsol*, 1 Pet. 328, 340, 7 L. Ed. 164, the following:

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct

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or otherwise its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void."

Further on he said :

"The Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction, it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void; their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged."

To the same effect are the following authorities: *Ex parte Rowland*, 104 U. S. 604, 26 L. Ed. 861; *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; *Worden v. Searls*, 121 U. S. 26, 7 Sup. Ct. 814, 30 L. Ed. 853; *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; *Ex parte Buskirk*, 72 Fed. 14, 18 C. C. A. 410, 25 U. S. App. 613.

So in *St. Louis, etc., Railroad Company v. Wear*, 135 Mo. 230, 265, 36 S. W. 357, 366, 33 L. R. A. 341, the court said :

"It is always permissible to show, upon process for contempt, that the order disobeyed was beyond the jurisdiction of the authority from which it emanated. If that showing is successfully made, no punishable contempt has been committed."

Growing out of this established rule is the further principle: The order alleged to have been violated must not only come clearly within the competency of the court to make, but the thing or act enjoined [183] must be clearly and definitely defined, so as to leave the party enjoined in no reasonable doubt or uncertainty as to what specific thing or act is prohibited. *Rapalje on Contempt*, p. 20; *Weeks v. Smith*, 3 Abb. Prac. 211-214; *In re Cary*, (D. C.) 10 Fed. 622, note. Did the court have jurisdiction to maintain and enforce in equity the relief prayed for in the bill of complaint? It was filed at the instance of the Attorney General of the United States on behalf of the United States, to enjoin the defendant railroad company from violating the interstate commerce law inhibiting the granting of rebates by the defendant carrier to favored shippers engaged in the shipping of grain and packing-house products from Missouri river points to Chicago, Ill., and common points of distribution there.

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It is true that allegations of a general character were inserted in the bill, with the evident purpose of giving a semblance of jurisdiction to the United States Circuit Court in equity as conferred by what is known as the "Sherman Anti-Trust Law." Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. There is a general charge in the bill that the defendant combined and confederated with certain persons, unknown, to create a monopoly in the transportation of said commodities on defendant's line of railway between the points aforesaid, "to transport such commodities between said points at rates much less than the published, established rates on such commodities at that time filed with said commission and in lawful force on defendant's line." This charge is confined to packing-house products and dressed meats; and the transportation involved was only between the specified points, and the monopoly was to be accomplished by giving to certain persons rates less than the schedule rates. It is not charged that such persons were favored over other shippers, or that these rates were not given to all shippers. This is immediately followed by the allegation that in pursuance of said combination the defendant transported "such packing-house products" from Omaha and Missouri river common points to Chicago and Chicago common points, billing the same at the established rates, but secretly transported such traffic at less than scheduled rates.

Section 2 of said anti-trust act is as follows:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

In *The United States v. Joint Traffic Association*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 31, 43 L. Ed. 259, the court said:

"In *Hopkins v. United States* (decided at this term) 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce and that to treat the act as condemning all agreements under which, as a result, the cost of con-

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ducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, [184] with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that 'the act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.'

While the bill under review does not allege an unlawful restraint, but a monopoly, the language and thought of the Supreme Court used in respect of the construction of the act as it touches contracts in restraint of trade, apply with equal force to an alleged monopoly. The statute, by no expression or implication, interdicts the increase of a railroad's business by any competition, however energetic, eager or grasping. The essence of the charge in the bill of complaint is that the defendant, by carrying in fact at a rate below that established and published, tried to get all the transportation it could of the designated products. In the *Trans-Missouri Joint Traffic Association Cases* the reasoning of the court was that the agreement there involved directly tended to obstruct free competition. By the portion of the bill here touching the Sherman act, it seeks to enjoin the defendant from doing the very act which, in the *Trans-Missouri Joint Traffic Case*, the court held to be unlawful in repressing. The truth is that, as the Department of Justice at Washington was somewhat in nubibus in its experiment with the resort to equity in order to escape the embarrassing question of the jurisdiction of the court, general allegations of a monopoly under the anti-trust act were thrown out as a possible life-preserver.

If, as contended by the United States attorney in his oral argument and brief, the bill of complaint is to be sustained on the ground of an allegation respecting monopoly under the Sherman act, how is this contempt proceeding to be sustained on that basis? The Sherman anti-trust act is an independent statute. It cannot be eked out or assisted by the interstate commerce act to create an offense under it.

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As the monopoly charged was a "combining and confederating with certain persons who are to the orator unknown, to create a monopoly in the transportation of said commodities (packing-house products) on defendant's line," how is the information for contempt to be sustained on the ground that, between the 1st day of August, 1903, and the 1st day of January, 1904, the defendant violated the injunction by a device whereby it granted rebates to a favored shipper of salt at Hutchinson, Kan.? The only charge of a monopoly predicated in the bill of complaint was in respect of packing-house products from Missouri river points east. The prayer of the bill in that part known as "the omnibus prayer for relief" is that the defendant, its officers, etc., be restrained "from paying any rebate or making any concession whatever, either by direct or indirect means, whereby any traffic transported by said defendant over its railroad, or in respect to any traffic in the transportation of which said defendant may participate shall be carried by it at any rate different from the lawfully published rate then established, etc." And so was the restraining order limited. The [185] information does not contain any allegation that the act in transporting salt constituted a monopoly. And yet, it is seriously contended that the jurisdiction of the court can be maintained on the ground of a monopoly interdicted by the anti-trust act, and of consequence the defendant can be charged with contempt on the ground of monopoly for having granted a rebate. The position is obviously untenable.

The bill of complaint must stand alone upon the interstate commerce act. The bill, as framed, and the argument made in support thereof at the hearing on the demurrer, were all based upon the broad proposition that, at common law, at the instance of the Attorney General of the United States, the United States had the right, in execution of the declared public policy of the general government in respect of the regulation of interstate commerce, to appeal to the equity side of its own courts for an injunction; that as by its legislation it was declared to be unlawful for any railroad, engaged in the carriage of interstate commerce, to make discriminations by the method of granting rebates to favored

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shippers, it could invoke the jurisdiction of this court to enjoin the offending railroad from doing such forbidden act. But after argument and submission of the demurrer to the bill the Supreme Court in *Missouri Pacific Railway Company v. United States*, 189 U. S. 274, 23 Sup. Ct. 507, 47 L. Ed. 811, held, as expressed in the syllabus, that prior to the passage of the act of Congress "to further regulate commerce with foreign nations and among the states," approved February 19, 1903 (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), a District Attorney of the United States under the direction of the Attorney General of the United States in pursuance of a request by the Interstate Commerce Commission was without power to commence a proceeding in equity against a railroad corporation to restrain it from discriminating in its rates between different localities. And, therefore, there was error committed below in refusing to sustain a demurrer of the defendant railroad company to a bill filed by a District Attorney of the United States under the circumstances stated.

The third section of the act of February 19, 1903 (32 Stat. 848, c. 708 [U. S. Comp. St. Supp. 1905, p. 600]), known as the "Elkins Act," is as follows:

"That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discrimination forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction: and when the act complained of is alleged to have been committed or is being committed in part in more than one judicial district or state, it may be dealt with, inquired of, tried, and determined in either such judicial district or state, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity * * * and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders. * * * It shall be the duty of the several district attorneys of the United States, whenever the Attorney General [188] shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this act shall not preclude the bringing of suit for recovery of damages by any party injured, or any other action provided by said act approved February fourth, eighteen hundred and eighty-seven, entitled An act to regulate commerce and the acts amendatory thereof."

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Mr. Justice White, in the opinion in *Missouri Pacific Railway Company v. United States*, *supra*, said:

"Although by the fourth section of the act (Act Feb. 19, 1903, c. 708, 32 Stat. 849 [U. S. Comp. St. Supp. 1905, p. 601]), conflicting laws are repealed, it is provided 'but such repeal shall not affect causes now pending, nor rights which have already accrued, but such causes shall be prosecuted to a conclusion, and such rights enforced in a manner heretofore provided by law, and as modified by the provisions of this act.' We think the purpose of the latter provision was to cause the new remedies which the statute created to be applicable as far as possible to pending and undetermined proceedings brought, prior to the passage of the act, to enforce the provisions of the act to regulate commerce. In the nature of things it cannot be ascertained from the record whether the railroad company now exacts the rates complained of as being discriminatory and which it was the purpose of the suit to correct; but if it does, of course the power to question the legality of such rates by a suit in equity, brought like the one now here, clearly exists. Under these circumstances we think the ends of justice will best be served by reversing the decree below and remanding the cause to the Circuit Court for such further proceedings as may be consistent with the act to regulate commerce as originally enacted and as subsequently amended, especially with reference to the powers conferred and duties imposed by the act of Congress approved February 19, 1903, heretofore referred to."

While it must be confessed that the paragraph above quoted is not very perspicuous, there is in my mind no doubt that it was the thought and purpose of the court that when the cause went back to the Circuit Court, if the defendant railroad company was then continuing to "exact the rates complained of" in the original bill, instead of putting the Government entirely out of court by dismissing the bill, it might amend informally—perhaps by motion—pursuant to said section of the Elkins act, by showing that the railroad company was continuing in the given particular, the violation of the interstate commerce act, to avoid the reinstitution of like complaint. In the very nature of the law, the injunction to be granted would apply to and operate alone upon acts then being done by the railroad company. It is inconceivable that the court could have intended to say that under the Elkins act an injunction could be had for a past violation of the interstate commerce law, not being repeated at the time of granting the injunction under the Elkins act. Otherwise it would be violative of rules of law deeply rooted in the jurisprudence of the country. An injunction never goes to restrain a past act, already accomplished. It acts alone upon a wrong in fieri. Again, all legislative enact-

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ments are presumed to be prospective in their operation, unless the contrary is expressly declared. "Courts refuse to give statutes retroactive construction unless the intention is so clear and positive as by no possibility to admit of any other construction." *Sedgwick's Construction of Statutes*, etc., 166.

Mr. Justice Cooley, in his work on Constitutional Limitations (page [187] 76), says in respect of the rule that legislative acts are presumed to be prospective in their operation, that:

"It is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively. * * * Retrospective legislation is * * * commonly objectionable in principle and apt to result in injustice; and it is a sound rule of construction which refuses lightly to imply an intent to enact it."

In *Finney v. Ackerman*, 21 Wis. 271, the court, speaking of the language used in the law of 1865, which in its broad sense might perhaps be held to apply to tax deeds previously executed, said:

"This language must, however, be construed as applying to deeds executed after the passage of the law. For the rule is well settled, that statutes are not to be construed as having a retrospective effect unless the intention of the Legislature is clearly expressed that they shall so operate. *Scamans v. Carter*, 15 Wis. 548. 82 Am. Dec. 696. That intention is not to be assumed from the mere fact that general language is used which might include past transactions as well as future. Statutes are frequently drawn in such a manner. Yet such general language is held to have been used in view of the established rule that statutes are construed as relating to future transactions, and not to past."

See full discussion of this question in *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *Lecte v. State Bank of St. Louis*, 115 Mo. 184, 21 S. W. 788.

The doctrine of relation, like every other fiction of the law, has its limitations. It can never be made to bear fruit where its root was not planted in some antecedent, lawful right. This principle is aptly illustrated by the opinion of Judge Adams in *Powers v. Hurmert*, 51 Mo. 136-138:

"Relation is sometimes allowed to prevent injustice, as when an attachment has been issued and levied without sufficient affidavit, and an amended affidavit is afterwards made it will relate back so as to uphold the attachment and uphold the previous levy. But, in that case, the right to the attachment and its levy existed at the time, and only lacked the formality of a sufficient affidavit."

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When the original bill was filed and the restraining order was made, there was no pre-existing equity in favor of the United States, sua sponte, at the request of the Interstate Commerce Commission, to institute such a proceeding for an injunction. The right to maintain it at the relation of the Government at common law did not exist. It did not attach under the interstate commerce statute for the all-sufficient reason that under Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384, as amended by Act March 2, 1889, c. 382, § 5, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3165], it is provided:

"That whenever any common carrier * * * shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the commission * * * it shall be lawful for the commission or for any company or person interested in such order or requirement to apply in a summary way, by petition, to the Circuit Court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and [188] the said court shall have power to hear and determine the matter * * * and if it be made to appear to such court, on such hearing * * * that the lawful order or requirement of said commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, etc. * * * and in case of any disobedience of any such writ of injunction * * * it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, etc."

Neither the bill of complaint nor the information herein alleges that any such order had ever been issued by the commission, and it is not claimed on behalf of the government that the commission ever proceeded beyond a preliminary inquiry. The jurisdiction of the United States Circuit Court to grant such injunction was conditioned upon the antecedent order of the commission, and failure of the defendant to comply therewith. *Interstate Commerce Commission v. Western, N. Y. & P. R. R. Co.* (C. C.) 82 Fed. 192, 196; *Farmers' Loan & Trust Company v. Northern Pacific Railway Company* (C. C.) 83 Fed. 249, 267; *Sheldon et al. v. Wabash Railway Company et al.* (C. C.) 105 Fed. 785; *Interstate Commerce Commission v. Lake Shore & M. S. Railway et al.* (C. C.) 134 Fed. 942, 946; *Interstate Commerce Commission v. Louisville & N. R. R. Co.* (C. C.) 73 Fed. 409; *Central Stock Yards Company v. Louisville & N. R.*

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Co. (C. C.) 112 Fed. 823, 827, 828. The Supreme court has recognized the correctness of this construction of the law, in *East Tennessee, V. & G. Railway Company v. Interstate Commerce Commission*, 181 U. S. 1, 27, 21 Sup. Ct. 516, 525, 45 L. Ed. 719, the court said:

"Whilst the court has, in the discharge of its duties, been at times constrained to correct erroneous constructions which have been put by the commission upon the statute, it has steadily refused, because of the fact just stated, to assume to exert its original judgment on the facts, where under the statute, it was entitled, before approaching the facts, to the aid which must necessarily be afforded by the previous enlightened judgment of the commission upon such subjects."

So, in *Interstate Commerce Commission v. Clyde Steamship Company*, 181 U. S. 29-33, 21 Sup. Ct. 512, 45 L. Ed. 729, the court again declined to go into an original investigation, saying that that duty was laid upon the commission by the interstate commerce act in the first instance.

This being conceded as correct law, as it must be, there was no jurisdiction in this court to make the injunction order in question. It challenges all our conception of law and precedent that that which was dead at common law can be regvanized and made alive by a post facto statute law. It would contradict the positive conclusion reached after most thorough investigation and discussion by Mr. Justice White in the case of *Union Pacific Railway Company v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, to attribute to his ruling in *Missouri Pacific Railway Company v. United States, supra*, the purpose to hold that the original bill in this case, predicated alone of a common-law right to relief in equity, could be so amended as to rest for its support upon the statute law enacted nearly a year after the restraining order was made under the common-law suit, so as to give life to such [189] antecedent order, and subject the defendant to prosecution for contempt for violating an order that was coram non judice when made. It was expressly held in *Union Pacific Railway Company v. Wyler, supra*, that a cause of action based on a common-law right could not be amended so as to predicate a further proceeding thereunder based on a statutory right, for the reason that it was not a continuation of the original cause of action, but a substituted cause.

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The repealing section of the Elkins act, saving the rights of causes then pending and rights which had already accrued, only declared that:

"Such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this act."

As there was no manner provided by law, prior to the Elkins act, enabling the United States to maintain such a bill in equity as the one under consideration, it had no rights in the proceeding to be saved. The words "as modified by the provisions of this act," being subjective rather than active in terminology, by no permissible liberality of construction can operate to make the Elkins act relate backward, so as to vitalize an order which was a dead letter when made. As already suggested the only comprehensible thought in the mind of the court in the *Missouri Pacific Railway Case*, supra, in reversing the decree of the Circuit Court, and sending the case back, was to allow the United States attorney to proceed therein in the summary, informal manner provided by section 3 of the Elkins act, by showing that the railroad company was then continuing to do the act complained of in violation of the interstate commerce law. If, after the passage of the Elkins act, the United States attorney might have appeared in this case, by motion, or otherwise, alleging that the defendant was continuing its alleged violation of the interstate commerce law, it must be conceded that he would thereby have presented an issuable fact on which the defendant would be entitled to have a hearing; for, if the essential fact did not exist, there could be no predicate for continuing the proceeding under the Elkins act. No such movement has ever been made by the United States attorney. This contempt proceeding, therefore, rests for its sole support upon an injunctive order the court had no jurisdiction to make when issued. The only answer made to this in argument is that, after the passage of the Elkins act, the court by order continued in force the restraining order of March 25, 1902. The effect of this, however, was not to issue any new injunction, but only to continue the original order. The continuing order was bottomed alone upon the original bill of complaint. If the original order made thereon had no force

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and effect in law when first made, the court, by no post mortem act, could vitalize it.

If the position of the government's counsel be well taken, it must obtain that if, in 1910, the Interstate Commerce Commission should, on investigation, ascertain that the defendant railway company, out on the Pacific Coast where its lines extend, was granting rebates on carloads of cattle or California fruits, or at Chicago, Ill., was granting rebates on agricultural implements, furniture, or dry goods and groceries, instead of the United States attorney for California or [190] Illinois instituting proceedings in that jurisdiction, as the Elkins act contemplates and provides, the United States attorney for the Western District of Missouri could move against the railroad company in this court for contempt of the restraining order made in March, 1902, based upon allegations that at that time the defendant was granting rebates on grain and packing-house products in this jurisdiction. If the restraining order of 1902 is not itself restrained by the rule *ejusdem generis*, then as to all the railroads, to wit, the Atchison, Topeka & Santa Fé Railway Company, the Chicago, Rock Island & Pacific Railroad Company, the Chicago & Alton Railroad Company, the Missouri Pacific Railway Company, the Chicago, Burlington & Quincy Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company, which were enjoined under a like bill and under a like order at the same time, there need never be any order made on them by the Interstate Commerce Commission to desist from granting rebates at any place or at any time, on any kind of commodity shipped by them, or any action taken against them by the United States District Attorney in the jurisdiction where the offense should be committed. But no matter when, where or how, or on what subject-matter of interstate traffic either of said roads may grant rebates, a resort in this court to a contempt proceeding against the company, under the order issued in March, 1902, predicated of a suit in equity of which this court had no jurisdiction, would hit the blot.

It must be conceded, beyond tolerant cavil, that a bill praying for an injunction must be predicated of some specific

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wrong then being done by the defendant to the complainant. The only violations of the provisions of the interstate commerce act specified in the bill as being committed at the time consisted in the granting of forbidden rebates on grain and packing-house products shipped from within this district. The eighth paragraph of the bill contained a broad, general averment based on information and belief, that on many other principal commodities, constituting the bulk of railroad traffic between the states, comprising the ordinary necessities of life, the said defendant grants unlawful rebates, etc., between the states and between the states and territories, to certain other favored shippers whose names are to the orator unknown. No venue is laid in this sweeping "omnium gatherum" charge; and no particular specification. It requires no citation of authorities to maintain that such indefinite, general allegation without place, whether in Illinois, Missouri, Kansas, Colorado, California, New Mexico, or Arizona, through which the defendant's lines extend, would not authorize the court to grant an injunction predicated thereon. The restraining order enjoined the defendant "from further acting under and enforcing or executing in any manner whatever any agreement to transport over defendant's railroad, or any part thereof, between the states, any packing-house products, dressed meats, grain, or the products of grain, or any other interstate traffic, at any greater or less rate than the rates named for such services in defendant's established schedule, etc." The authorities are all agreed that the general words "or any other interstate traffic," used in such connection, on the rule of *noscitur a sociis* and *eiusdem generis*, are controlled by the antecedent specification, and are limited to objects "of like kind with those specified." *United States v. Bevans*, 3 Wheat. 336, 4 L. Ed. 404; *St. Joseph v. Porter*, 29 Mo. App. 605; *State v. Bryant*, 90 Mo. 534, 2 S. W. 836; *Fuchs v. St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; *City of St. Louis v. Laughlin*, 49 Mo. 559; *Ex parte Neet*, 157 Mo. 527, 57 S. W. 1025; *State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 68 C. C. A. 288.

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True it is that the general evil struck at by the interstate commerce act was unjust discriminations and rebates; yet, the specific subject-matter predicated in the bill of complaint was rebates being granted on grain and prepared meats and their products, being shipped from this jurisdiction. Allied products of those specified commodities would alone come within the requirements of the rule of ejusdem eadem. In the case of *Swift v. United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 279, 49 L. Ed. 518, there was an injunction against the defendants, restraining them from using certain specific devices in violation of the anti-trust act, followed by a general clause, not dissimilar in its import to the general clause in the restraining order herein. When this general clause was attacked as vicious, in argument before the Supreme Court, the Attorney General of the United States said in reply:

"It is not true that this injunction broadly enjoins them against violations of the law. It enjoins them against certain specific conspiracies, well pleaded in the petition, well stated in the injunction, capable of being understood by one who desires to understand them. The particular paragraph of which my friend so much complains—the language or by any other method or device, the purpose or effect of which is to restrain commerce as aforesaid—is not open to the objection which he urges against it. There are specific devices set forth in the injunction and prohibited, and there is a general prohibition in the clause against any combination to restrain commerce as aforesaid; that is, according to the specific restraints which precede immediately this paragraph of the injunction."

In the opinion delivered by Mr. Justice Holmes, he says:

"We are bound, by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of the summons for contempt. We cannot issue a general injunction against all possible breaches of the law. * * * The general words of the injunction 'or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid,' should be stricken out. The defendants ought to be informed, as accurately as the case permits, what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning that it was our duty to avoid."

Comment: This proceeding by contempt against the railroad company does not commend itself to my sense of fair play and "a square deal." The Hutchinson & Arkansas River Railroad Company is a railroad corporation, chartered by the state of Kansas. As such, it is presumptively

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invested with the power to exercise the right of eminent domain; and is presumptively a public carrier, authorized to carry freights for hire, although it may confine its operations to the transportation of the output of particular salt mills. No railroad [192] company connecting with or receiving freights from it has a right to demand or expect that it should carry and deliver to it freight free of charge. Whether its rates exacted are excessive and forbidden depends upon whether or not the creative act from the state or the state authority has fixed a maximum. If that be exceeded, it rests for correction in the right of visitation and interference on the part of the state. Congress has not undertaken to regulate the matter of an equitable division of rates on a joint tariff between two railroads. Under existing law, that is entirely a matter of private contract between the railroads, and if the joint through rate be less than the aggregate of the local rates fixed under the existing local laws, it is a matter of no concern to the government. The interstate commerce act only requires that the established schedule shall be filed with the commission, duly published; and that it shall then be adhered to by the joint parties. Any railroad company touching at Hutchinson, Kan., desiring to do business in carrying salt, finds the shipper entrenched behind a chartered railroad connected with the plant or plants of the salt manufacturer, which carries the entire output to the connecting roads. The shipper says to the railroad soliciting its business: We will ship over our short line and deliver to you on condition that you will make a joint through rate agreement with us, or for terminal facilities, giving us the lion's share of the income or charge, which may be an exorbitant exaction. The soliciting railroad must submit to the exaction or do no business with the large shipper. When thus coerced, some other shipper of salt at Hutchison, who does not own any connecting short line road, becomes jealous of his competitor in business, and complains to the Interstate Commerce Commission, charging that the short railroad thus used is but a device by which such shippers obtain a rebate. Instead of the government invoking all of the prohibitory and penalizing provisions of the statutes against the real offender—the shipper—in such

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transactions, by directly proceeding against him in the United States Circuit Court of Kansas, where the offense was committed, it resorts to a prosecution for contempt, under an order 3½ years old, made in this jurisdiction, predicated of an entirely distinct subject-matter of traffic, and asks that the interstate railroad company alone be punished. And this court, in this *ex parte* proceeding against the railroad company, is asked to enter into an investigation of the character of the railroad at Hutchinson, as to who are its stockholders and operators, and the exact relation between it and the Hutchinson-Kansas Salt Company, and how the contract for through traffic rates between the parties was brought about. When the government shall pursue and punish such shippers, if guilty, it will strike at the very root of the rebate evil. And as I doubt not the railroad companies would profit by the result, they can best bring about the desired consummation by opening instead of closing the mouths of the men under their control when their evidence is sought.

There is a second like information against the defendant railway company, growing out of the rebates alleged to have been conceded to the Colorado Fuel & Iron Company, a corporation of Colorado, on shipments of coal from Trinidad, Colo., and Gallup in the territory [193] of New Mexico, to points in the territory of Arizona, El Paso, Tex., and to points in the republic of Mexico. These shipments were made in 1903-1904. This instance has attracted considerable public attention, because of the sensational association of the names of Mr. Ripley and Paul Morton, then president and vice president, respectively, of the defendant company, with the transaction. The record in the case, however, consisting of the pleadings and the exhibits of evidence taken before the Interstate Commerce Commission, fails to furnish any foundation for imputing to those gentlemen any personal responsibility for the alleged violation of the interstate commerce law. Such matter, however, is extraneous. For the reasons assigned in the foregoing discussion, this court cannot proceed to sentence in this contempt proceeding. However reprehensible the conduct of the defendant railroad company, if it be as alleged in these transactions, may

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have been, or however much disposed this court be to compel obedience to its lawful mandates, it is persuaded that it is without authority in this proceeding to draw to it the questions involved, rightfully belonging to the jurisdiction of the United States Circuit Court for the Districts of Kansas and Colorado. "Thus saith the law" is a perpetual injunction upon the judge, when called upon to exert judicial power, which he may not disregard without standing in contempt of his own conscience.

It results that the motions to quash the informations are sustained.

[216] LOEWE ET AL. v. LAWLOR ET AL.

(Circuit Court, D. Connecticut. December 13, 1905.)

[142 Fed., 216.]

PLEADING—SUFFICIENCY OF COMPLAINT—ACTION UNDER ANTI-TRUST ACT.—The complaint, in an action to recover damages under section 7 of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), held sufficient on a motion for correction of the same.^a

At Law. On motion for correction of complaint.

See 130 Fed. 633.^b

Davenport & Banks, for plaintiffs.

Bristol, Stoddard, Beach & Fisher, De Forest & Klein, and *Howard W. Taylor*, for defendants.

PLATT, District Judge.

The dispute herein has not yet reached that critical period which warrants a recital of the elaborate complaint which the motion attacks. It is enough to say that the gist of it is somewhat as follows, viz.: For many years the plaintiffs had been opposed to the closed-shop policy, and had consistently refused to take any action tending to establish that policy, and the defendants knew it. On July 25, 1902, the plaintiffs had a large and profitable interstate trade in hats. The de-

^a Syllabus copyrighted, 1906, by West Publishing Co.

^b See p. 563.

Syllabus.

endants, with others (see paragraphs 9-18, inclusive), had a way of making people come to terms on the disputed issue, which way is described carefully and minutely. They had been instrumental in using the described way effectively upon many individuals, firms, and corporations, and had boasted of their success, so as to affect the plaintiffs when they should come at them. In 1901 they told the plaintiffs that, if they did not yield on the disputed issue, they would treat them as they had the others and force them to do so, but plaintiffs refused to yield. Thereupon and therefore, on July 25, 1902, defendants put into operation the machinery before described, with attachments thereto and refinements thereof, and so inflicted serious injuries upon plaintiffs in violation of the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), under which and by virtue whereof this suit has been brought.

[217] It is not understood to be one of the functions of the court, on such a motion as this, to compel the plaintiffs to state their case in the way most satisfactory to the defendants. Indeed, it is not easy to conceive how such a complicated situation, covering, as it does, such an important and serious question, could have been otherwise set forth. At any rate a close scrutiny of the complaint discloses nothing which is so obviously wrong that it ought to be expunged on motion.

Motion denied.

[531] RUBBER TIRE WHEEL CO. v. MILWAUKEE
RUBBER WORKS CO.

Circuit Court, E. D. Wisconsin. January 23, 1906.)

[142 Fed., 531.]

PATENTS—LICENSES—RIGHT TO ATTACH CONDITIONS.—It is within the rights of the owner of a patent to grant licenses conditioned that the licensees shall sell the patented article only at prices fixed by the agreement and also restricting the production of a licensee, and such agreements, if made in good faith and for the purpose of protecting the patent monopoly, are not illegal as in restraint of trade and commerce, and such good faith is not impeached by the fact

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that the patent has been held invalid by the federal courts in some circuits, where it has been sustained in others.

[Ed. Note.—Power of patentee to control his invention, see note to *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.*, 25 C. C. A. 280.]

PATENTS—LICENSES—VALIDITY OF PROVISIONS—RESTRAINT OF TRADE.—

Complainant, owner of a patent for a rubber tire which had been adjudged invalid by the Circuit Court of Appeals for the Sixth Circuit, entered into license contracts with all of the large manufacturers of tires in the United States, all of whom were engaged in interstate commerce. Such contracts were uniform, and each made a part thereof collateral contracts made at the same time, one of which was between complainant on one part and all of the licensees on the other. As a whole the contracts provided for the payment of a royalty equal to 4 per cent. of the net selling price of the tires made thereunder, fixed the prices at which the tires should be sold at a substantial advance over the then market price, and also limited the production of each licensee to a certain per cent. of the production of all, providing that if the licensee made less than his "quota" he should be paid a rebate of 20 per cent. on the value of the shortage, and if he made more he should pay a royalty of 20 per cent. on the excess. The contracts also provided for a board to supervise the operations of the licensees to which one-half the royalties should be paid and which should have power, with the consent of a majority of the licensees, to purchase tires from any of them and resell at such prices as it deemed for the interest of all. *Held*, that such contracts went beyond the rights of complainant under its patent monopoly in raising and maintaining prices in the states composing the Sixth federal circuit, in which the monopoly had no practical existence, and in creating a fund to be used to crush competition by outside manufacturers, as well in the Sixth circuit as elsewhere, and were illegal and void as creating a combination in restraint of interstate trade and commerce, in violation of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200.])

Winkler, Flanders, Smith, Bottum & Fawsett and *Augustine L. Humes*, for plaintiff.

John F. Burke and *Charles Quarles*, for defendant.

SANBORN, District Judge. Action at law to recover royalties under the Grant patent, No. 554,675, dated February 18, 1896, for rubber-tired wheels. The royalties claimed amount to \$4,109.42; but, deducting certain offsets, the plaintiff, if entitled to recover, should have judgment for \$2,517.66 principal, with 6 per cent. interest from the time the several amounts of royalties going to make up this sum

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became due, with due regard to the time of the payment of the sums making up the offsets. The defenses are that the license contract securing the royalties is denounced as illegal by the Sherman anti- [532] trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), making void every contract combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states; also that the royalty contract is invalid under section 1791j of the Wisconsin Revised Statutes of 1898, prohibiting corporations organized under Wisconsin laws from entering into any combination, conspiracy, trust, pool, agreement, or contract intended to restrain or prevent competition in the supply or price of any article constituting a subject of trade or commerce in Wisconsin. Defendant is a Wisconsin corporation, and plaintiff an Ohio corporation. The reply to these defenses, in argument, is that they are immaterial, because the articles in question are patented, and the royalties claimed are under a patent monopoly; hence the license is neither within the Sherman act nor the Wisconsin trust act. In rebuttal to such anticipated reply, defendant pleads in its answer that the several agreements between the parties set out in the complaint were intended to form a combination in restraint of trade; that the patent mentioned in such agreements was void, and was believed by all the parties to the agreements to be void; that the patent had been so adjudged by the United States Circuit Court of Appeals for the Sixth Circuit, and the Supreme Court had refused to review that decision; that the patent was resorted to as a pretext merely to enable the contracting parties to evade the Sherman act and the Wisconsin statute, and the license contracts were not in fact, nor intended to be, license contracts under letters patent; but to create such unlawful combinations that by such contracts prices were raised beyond the natural and legitimate market prices, and the amount of manufactures restricted; and that the pretended license contracts were void under the Sherman act and the Wisconsin statute.

The three contracts pleaded and proved show a combination in restraint of trade and are in substance as follows: On October 10, 1903, plaintiff and defendant made the

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license agreement. It recites that plaintiff is the owner of the patent, and that defendant desires to obtain the right to manufacture, use, and sell vehicle tires made under the patent. Therefore it is agreed that plaintiff grants defendant such rights for one year, to the extent set forth in a "supplementary agreement" attached to the agreement of license, in the United States, except 19 states and certain counties and cities in other states. Three counties in Ohio are excepted from the grant. Plaintiff agrees to vigorously prosecute infringements, except such as may be committed in the Sixth federal circuit. Defendant agrees to pay a royalty of 4 per cent. of the net selling price of tires made under the license, and the further royalty of 20 per cent. over its "quota" fixed by the supplementary agreement. The supplementary agreement, of even date with the license, recites licenses like the foregoing to 17 other rubber-tire manufacturing companies, and fixes the quota which defendant shall manufacture each month during the license year at 2 per cent. in dollars and cents of the aggregate amount made and sold by all the licensees. The third agreement, made at the same time, called the "Licensees' Agreement," is between plaintiff as first [533] party and all the licensees as second parties. It recites the licenses, and that it desired that the right of manufacture shall be exercised on uniform terms and conditions, and the operations of all the licensees supervised by an impartial administration. Therefore it is agreed that if any licensee shall sell more than its quota it will pay, in addition to the 4 per cent. royalty, 20 per cent. on the amount sold by it in excess of its quota; and, on the other hand, if it shall sell less than its quota, it shall be paid 20 per cent. on the shortage. Prices for first quality tires are fixed at 65 cents a pound, and for second quality 55 cents. Plaintiff agrees to employ a commission of five persons to supervise the operations of the licensees, and pay it one-half the royalties, or 2 per cent. If any licensee sells at less than the fixed prices it is to forfeit its right to license rebates under this contract. The licensees are to manufacture only two grades of tires. The commissioners may, by written consent of a majority of the licensees, purchase tires from any of them, and resell at such prices as they may deem for

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the interest of all the parties. These contracts most clearly make a combination within the Sherman act, if the subject-matter be within that act. That is the only question in the case.

The following facts appear in evidence: There has been considerable litigation over the patent. It was first sustained in *Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co.*, 91 Fed. 978, in the Circuit Court for the Southern District of New York, decided in December, 1898. In May, 1902, the patent was sustained by the Circuit Court for the Southern District of Ohio (unreported), but on appeal the Circuit Court of Appeals for the Sixth Circuit held it void as an aggregation of old devices. *Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co.*, 116 Fed. 363, 53 C. C. A. 583, before Lurton, Day, and Severens, circuit judges. About the same time, in *Consolidated Rubber Tire Wheel Co. v. Finlay Rubber Tire Co.*, 116 Fed. 629, in the Circuit Court for the Northern District of Georgia, Judge Newman sustained the patent, and also held defendant estopped to contest the validity of the patent. Before his opinion was published his attention was called to the Ohio case, but he declined to change his decision, as defendant was estopped. The patent was also declared valid in the Circuit Court of Appeals of the Republic of France, sitting at Paris. There is also an infringement suit now pending in the Southern District of New York, brought to stop infringement and also for the purpose of obtaining either an agreement in the various circuits as to the validity or invalidity of the patent, or such disagreement among them as will take the question to the Supreme Court. That court denied certiorari to review the Ohio decision. 187 U. S. 641, 23 Sup. Ct. 842, 47 L. Ed., 345. The Circuit Court of Appeals of the Sixth Circuit also held the patent invalid in *Rubber Tire Wheel Co. v. Victor Rubber Tire Co.*, 123 Fed. 85, 59 C. C. A. 215, following the Goodyear Case. In the case now pending in New York, the witness Stapleton and several other attorneys represent the complainants, one of them being plaintiff here. Soon after the decision in Ohio, Mr. Stapleton advised plaintiff that the patent is valid, and so advised it in the early part of

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1903. Similar advice was given [534] by Mr. John R. Bennett, an experienced patent lawyer in New York.

The opinion of Mr. Stapleton was based on the fact that the judges in three of the circuits had upheld the patent, and on his opinion that the Court of Appeals of the Sixth Circuit based its decision on wrong premises. The "tipping function" of the patented tire, hereafter described, the court held was not disclosed in the patent specifications. It was held that the specifications do not state how tightly or loosely the tire is to be applied to the wheel, so as to make this tipping function operative. Mr. Stapleton thinks the court was mistaken in this respect, and for that reason advised plaintiff that the patent will be sustained. It further appears in evidence that early in 1903, before the contracts in question were made, the rubber tire market was much demoralized. Prices were being cut by many manufacturers. After the combination was made the prices were maintained as fixed in the agreement, and it did away with all competition. Before the combination prices were 50 cents and 40 cents, respectively, and afterwards 65 and 55. After the expiration of the agreement the prices went back to the former rates. During the combination defendant made no effort to get any new business. All the tire manufacturers were in the pool except two small concerns. Defendant's tires were made in Wisconsin and sold in that and many other States.

The patent is for a specific combination of old devices. The chief ground on which it is sought to be sustained is that it produces a new and useful result, a new mode of operation, or an old result in a more advantageous way. The new result claimed is the neutralizing of side strain, from blows or friction, by what has been called the "side-tipping function," not found in the prior art. From the cut of a transverse section of the tire and felloe it will be seen that side pressure on the tire, if the retaining wires be not too tightly drawn, will cause the tire to rise on the side pressed, and tip on the other, rising in the channel and turning on the corner or angle of the opposite side, as upon a pivot, returning to its seat when the pressure is removed. Thus the strain is relieved, and both breaking and splitting prevented, as

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well as the cutting of the tire on the sloping flange or rim of the wheel. In the New York and Georgia cases this "tipping function" is held a novel and useful result, sufficient to sustain the patent. But in the Ohio case, while it is admitted that this feature, if present, might sustain the patent, yet that it is neither specified or claimed by the patentee. It is said by that court to depend on the proper tension of the retaining wires, and the specifications nowhere show how tight they shall be. Judge Lurton says:

"If this capacity for side movement be a beneficial function plainly inherent in Grant's combination and arrangement of old parts in relation to each other, and not a mere 'obscure property lurking in some accidental corner of his device,' it was not essential that the patentee should point it out as one of the advantages of his structure. This is because he has invented a machine, structure, or manufacture which includes in its necessary mode of operation the function in question, and, whether the inventor knew or not the full measure of the beneficial function of his structure, he is entitled to all the uses of his invention."

The court held that the tipping function was not plainly inherent in his very structure or device, because there is nothing to show how [535] tight the wires are to be stretched. The tipping capacity is not even pointed out, so that no mechanic, following the specifications, would know how tight or loose the wires were to be made. 116 Fed. 375, 376; 53 C. C. A. 583. On the other hand, Judge Newman, in the Georgia case, says that the shape of the tire—that is, the outward slant of the portion within the rim—its close fitting against the rim, and its angle below the edge of the rim, cooperate with the two-part wire fastenings to cause the rubber to rise, when exposed to extraordinary lateral force on one side, and turn on the angle of the other side, thus producing the tipping function and relieving the strain.

I have thus stated the question of patentability for its bearing on the belief and intent of the parties to this suit, their bona fide belief on the question of validity, and their resulting intent in making the licenses and licensees' agreement; in other words, in forming the tire trust. Mr. Stapleton, believing that the Court of Appeals of the Sixth Circuit missed the true construction of the specifications in respect to this new function, advised plaintiff, before the trust agreement was made, that the patent was, in his opinion, valid.

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Certainly it is entirely probable, as it seems clear to me, in view of such opinion so expressed, the opinion of Mr. Bennett, the character of the question itself, the fact that three Circuit Courts and the French court have sustained the patent, and the great success which the tires have been, in practical effect, that the parties to this suit, and to the licensees' agreement, may in good faith have believed in the validity of the patent. There is nothing in the character of the concrete, though narrow, question of patentability, as it seems to me, which rebuts the probability of such honest belief. It may well have been supposed, because the tipping function has an actual, practical existence in the tires built under the patent, that this feature, however obscurely, is included in the specified mode of operation, and that such novel and beneficial result would save the patent in the end, notwithstanding the Ohio decision. The Grant tires are wonderful preservers of carriages, old and new. If the "one-hoss shay" had been equipped with them it would, in my opinion, be running yet. It is at least possible that the courts will find in the patent specifications, by fair implication, a function which skilled workmen, all over the country, have actually found in them; and the owner and its licensees, though conscious that the patent has been to some extent discredited, and that its validity rested on narrow grounds, might yet have honestly believed that it would be finally sustained. At all events, bad faith has not been proved.

But, if it be assumed that the Ohio decision was the inducing cause of the combination, a more serious question is presented. Likewise, if the combination went beyond what was reasonably necessary to the enjoyment of the patent monopoly. It is impossible to restrain commerce in a thing which has no inherent commercial freedom. An existing monopoly can not be monopolized. The patentee having brought forth the article from the world of mind, having added so much to the common stock of property, may do as he chooses with it. *Singer v. Walmsley*, Fed. Cas. No. 12900. It is the patented machine or device itself, not merely the mental conception producing it, which [536] is protected from infringement. Any other rule would render

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the patent protection wholly illusory. Such protection extends to assignees and licensees equally with the patentee. It is not until the patented device has been sold and passed out of the dominion of the patent owner that the monopoly limit is reached. *Adams v. Burke*, 17 Wall. 453, 21 L. Ed. 700; *Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848.

The Constitution, in the interests of invention, grants to the patentee the absolute right to exclude or debar the world from making, using and selling his device; and Congress by passing acts in aid of powers given it, like the power to regulate commerce, can not interfere with this constitutional right of exclusion, embargo, or inhibition. Having the absolute power of complete exclusion, the proprietor may exclude, conditionally or in part, by imposing limits as to time, place, price, or persons. He may deal arbitrarily, may sell or withhold from sale, vend to one at one price and to another at a different price, permit use in one State and not in another, give reasons or not, or deal fairly or unfairly; and in doing all or any of these he is within his right, until the patent expires or is avoided, or the articles pass beyond the limits of his monopoly. He may even bring nonpatented articles within his monopoly by providing that the patented device shall be sold only in connection therewith. All this is so well settled, not only as to patents, but copyrights, secret process remedies, and trade secrets, that it is only necessary to refer to a few cases. *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58; *Bement v. National Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *U. S. Consol. S. R. Co. v. Griffin & Skelly Co.*, 126 Fed. 364, 61 C. C. A. 334; *Rupp, Wittgenfeld Co. v. Elliott*, 131 Fed. 730, 65 C. C. A. 544; *Dr. Miles Medical Co. v. Goldthwaite (C. C.)* 133 Fed. 794; *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031. Like every kind of arbitrary power it is liable to abuse, but the power to abuse it resides in its very nature.

These observations apply only to patented articles which have not passed beyond the monopoly limit through sale by the patentee, licensee, or assignee. Here the monopoly ends.

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The articles are then in the same condition as if unpatented, subject to all trade and commerce regulations like any other property. See *Adams v. Burke*, 17 Wall. 453, 21 L. Ed. 700. Nor do such observations seem to apply to sale or manufacture in the states composing the Sixth federal circuit. It can not be reasonably said that the proprietor has power to exclude or debar the use, sale, or manufacture in Ohio, Michigan, Kentucky, or Tennessee, since no court there will grant it an injunction, decree for infringement, or account, or judgment for damages. In those states the patent owner has no power at all, no dominion of market, no monopoly. It can not, from a practical standpoint, accomplish a single one of the things mentioned which flow from its monopoly, simply because no remedy there exists. "Ubi jus, ibi remedium, et vice versa."

What the effect of a decision avoiding a patent for lack of novelty has upon the nine lives of a patent is a practical question, not a theoretical one. Suppose the same thing had happened to this patent as [537] occurred in the *Driven Well Cases*, 122 U. S. 40, 7 Sup. Ct. 1073, 30 L. Ed. 1064, and 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160; the patent being held void in one and valid in the other. If the Supreme Court in one case should hold the device anticipated, and in the other, for lack of evidence, sustain the patent, the effect would be to destroy the monopoly. True, the patent would still be presumptively good. The decision of the Supreme Court would not even be evidence against it. Pleading and proof would still have to show the prior art; and the patent might in a particular case be still sustained, even by the same high court which formerly avoided it. But from the practical standpoint the patent would be worthless. The owner would not have the presumption to attempt its enforcement. No Circuit Court in the country would afford him a particle of real protection. He would be helpless, the patent lifeless and despised, dead beyond the power of resurrection, no matter how useful the machines or devices made under it. Any attempt to revive such a patent and give it vitality would not only be futile, but would bring it and its proprietor into further contempt. But in the rest of the United States the Grant patent stands on different grounds. The Sixth circuit de-

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cision would not afford the slightest evidence of its invalidity, however persuasive upon the court it might be. Not only this, but plaintiff believed it valid. Nor is there any evidence to show that the decision of the Sixth Circuit Court of Appeals was the inducing cause of the combination. I think it was due to the belief of all the parties that such a combination was within the rights of the plaintiff as owner of the patent. I do not find any evidence of bad faith on the part of either of the parties to this suit, or any of the licensees.

But the vital question, upon which I have had much difficulty, is whether the combination goes so much beyond the limits of the patent monopoly, and secures results so unnecessary to the patentee's rights, as to render the license agreements void. Do the restrictions of the license agreements add to the patent monopoly, or do they only keep up or continue the monopoly secured by the patent? The patentee having by his invention brought into existence the patented devices, they are not, in the usual sense, the subjects of monopoly. "A patent is that which brings out from the realm of mind something which never existed before and gives it to the country." *Singer v. Walmsley*, 1 Fish. Pat. Cas. 558, 22 Fed. Cas. 207. Monopoly restrains trade or commerce in articles which before were the subjects of trade or commerce. Patented articles were not so, for they did not exist before. Hence they cannot be the subjects of prohibited monopoly, unless the restriction be extended beyond what the patentee secures. *In re Greene* (C. C.) 52 Fed. 194; *Bement v. Harrow Co.*, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; *U. S. Cons. Seeded Raisin Co. v. Griffin & Skelley Co.*, 126 Fed. 365, 61 C. C. A. 334; *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 64 C. C. A. 594. What, then, does the patent secure? What are the true limits of the lawful patent monopoly? Are the license agreements in their very nature illegal, because going beyond the patent domain, and employing restrictions not essential to fortify or sustain the patent right? As stated be- [538] fore, the patentee has the right of exclusion or inhibition against all others, in the making, use, and sale of the new devices he has invented and newly produced, and within this field his rights

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are unlimited. The license agreements do not attempt to limit total production, nor, apparently, the field of production or territory of sale. They do not restrict competition between the various licensees. They fix and control prices, and the quota of each manufacturer—provisions entirely lawful, and within the patent monopoly. They regulate the kinds of tires to be made, also permissible. They create a board of arbitration or administration, to enforce the performance by all the parties of the terms of their agreements, which would not be subject to criticism, unless designed to reach beyond the patent field and secure results not granted by the patent laws.

But in two important ways the provisions of these contracts attempt to secure results not contained within or flowing from the lawful monopoly of the patent. First, they raise and maintain prices, and restrict trade and interstate commerce, in Michigan, Ohio, Kentucky, and Tennessee, where the patent monopoly has no practical existence; second, they create a fund for crushing competition in interstate commerce throughout the whole country, as well in the Sixth circuit as elsewhere, and not only competition in the Grant tires between outside manufacturers and those who are in the combination, but competition of all other rubber tires against the Grant tires. The arbitrators may, with the written consent of a majority of the licensees, purchase tires from them and sell at any price. They could thus, by selling at less than cost, stamp out and destroy competition against the licensees by independent makers of any kind of rubber tires. In these two ways the contracts do, in my opinion, secure illegitimate results, in their nature unlawful, neither contained within nor essential to the patent monopoly. It is true, as the Supreme Court has decided, that agreements made to promote legitimate business under a patent, with no purpose to thereby restrain interstate commerce, are not within the anti-trust act, even if they do indirectly and remotely affect such commerce. *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259. Although I do not find in this case express unlawful intent, yet the necessary result being the restraint of interstate commerce in a prohibited field, not indirectly or remotely, but directly and substan-

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tially, it necessarily follows that the contracts were invalid, and that the suit must fail.

Within the proper domain of his monopoly the patentee may combine and conspire and restrict as much as he pleases. But I cannot conceive that enlightened courts, under a government of law, will find it consonant with just notions of duty to permit a patentee, however worthy his invention or large and extensive his rights, by means of his royalties to create a fund for crushing lawful opposition, destroying legitimate and proper competition, and restraining trade and commerce, not only in the patented articles themselves, but all others competing with them. Even in territory lawfully subject to his monopoly, I cannot believe this possible; still less in a broad do- [539] main covering four populous states in which the patent has become practically worthless—a territory greater in extent than that of the British Isles. .

In view of the conclusion reached it is unnecessary to consider the effect of the trust act of Wisconsin. See, however, *U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelley Co.*, 126 Fed. 364, 61 C. C. A. 334; *Columbia Wire Co. v. Freeman Wire Co.* (C. C.) 71 Fed. 302.

Defendant's attorneys will prepare findings conforming to this opinion, and directing judgment dismissing the complaint, with costs.

[179] CINCINNATI, PORTSMOUTH, BIG SANDY
AND POMEROY PACKET COMPANY v. BAY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 174. Argued December 15, 1905.—Decided January 2, 1906.

[200 U. S., 179.]

Where it appears from the record of a case in a state court that a Federal question was raised, and, in the absence of an opinion, it appears from a certificate made part of the record that it was not raised too late under the local procedure, and that it was necessarily considered and decided by the highest court of the State, this court has jurisdiction to review the judgment on writ of error.

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it; and where a contract relates to commerce between points within a State, both on a boundary river, it

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will not be construed as falling within the prohibitions of the Sherman act because the vessels affected by the contract sail over soil belonging to the other State while passing between the intrastate points.

Even if there is some interference with interstate commerce, a contract is not necessarily void under the Sherman act if such interference is insignificant and merely incidental and not the dominant purpose; the contract will be construed as a domestic contract and its validity determined by the local law.

A contract for sale of vessels, even if they are engaged in interstate commerce, is not necessarily void because the vendors agree, as is ordinary in case of sale of a business and its good will, to withdraw from business for a specified period.^a

[A purchaser of river craft cannot invoke the antitrust act of July 2, 1890 (26 Stat. L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to relieve him from his obligation to pay the purchase price, because of his covenant to maintain the present traffic rates, which is not declared by the contract to enter into the consideration of the sale—especially where the rates referred to primarily, if not exclusively, relate to domestic, and not to interstate, business.]^b

THE facts are stated in the opinion.

Mr. Ledyard Lincoln, with whom *Mr. Julius L. Anderson* was on the brief, for plaintiff in error:

The contract is void under the Sherman act.

Repeated attempts have been made to restrict the broad and general language of the statute, but the Federal courts and especially this court have uniformly held that the act means just what it says and cannot be confined to unreasonable restraints nor such as were condemned by the common [180] law before its passage. *United States v. Freight Assn.*, 166 U. S. 290, 312, 340; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 573, 575; *United States v. Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271; *S. C.*, 175 U. S. 211; *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 402; *Ches. & Ohio Fuel Co. v. United States*, 115 Fed. Rep. 610, 619.

The commerce restrained was interstate. Both the Portsmouth Company and the Bays were engaged in steamboat-

^a The foregoing syllabus and the abstracts of arguments copyrighted, 1906, by The Banks Law Publishing Co.

^b This paragraph taken from the U. S. Supreme Court Reports, Book 50, p. 428. Copyrighted, 1906, by the Lawyers' Co-Operative Publishing Co.

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ing between ports in Pennsylvania, West Virginia, Ohio and Kentucky. Nor was the element of restraint merely ancillary. *Tuscaloosa v. Williams*, 127 Alabama, 110, 119.

It cannot be questioned that the transportation of persons and property from one State to another is interstate commerce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Lottery Case*, 188 U. S. 321, 345.

The transportation of goods on a through bill of lading from one point in a given State to another in the same State by way of an adjoining State or Territory is interstate commerce. *Hanley v. Kansas*, 187 U. S. 617.

The States of Kentucky and West Virginia extend to low water mark on the Ohio side, so that even boats plying directly from Syracuse to Cincinnati without stopping at intermediate points would necessarily at ordinary stages of the river pass through parts of West Virginia and Kentucky. *Indiana v. Kentucky*, 136 U. S. 479; *Hanley v. Anthony*, 5 Wheat. 374; *Booth v. Hubbard*, 8 Ohio St. 243; *McFall v. Commonwealth*, 2 Metcalf (Ky.), 394.

Contracts not relating directly to interstate commerce, but local in their nature, have been held not within the prohibition of the Sherman act, although the parties contracting in fact sold commodities or solicited business beyond the state line, as the contract must affect interstate commerce directly and not remotely or incidentally. *United States v. E. C. Knight Co.*, 156 U. S. 1; *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604. But see *United States v. Freight Assn.*, 166 U. S. 290, 325; *Lufkin v. Fringeli*, [181] 57 Ohio St. 596; *Monongahela Co. v. Jutte*, 210 Pa. St. 288, and cases cited in note; 74 Am. St. Rep. 235, 273; *Bement v. Harrow Co.*, 186 U. S. 92.

The Sherman act prohibits any contract in restraint of trade which would be illegal at common law. As to what would be illegal see *Horner v. Graves*, 7 Bingham, 735, 743; 24 Am. & Eng. Ency. of Law, 850, and as to rule in the State of Ohio see *Lange v. Work*, 2 Ohio St. 519, 528. See also *United States v. Addyston Pipe Co.*, 85 Fed. Rep. 271, and cases cited, p. 290; *Texas v. Southern &c. Co.*, 6 So. Rep. 888; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Emery v. Candle Co.*, 47 Ohio St. 320; *State v. Standard Oil Co.*, 49 Ohio St.

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137; *South Chicago v. Calumet*, 171 Illinois, 391; *Anderson v. Jett*, 89 Kentucky, 375 (a case of competing steamboat lines).

The two packet companies who signed the contract were not engaged in private, but in quasi-public business, and therefore any restraint upon such business would be prejudicial to the public interest and cannot be sustained. *United States v. Freight Assn.*, 166 U. S. 333; *Gibbs v. Baltimore*, 130 U. S. 396.

The Federal question was raised properly and in time.

If the Federal or jurisdictional question be raised for the first time in the assignments of errors in the Supreme Court of the State, the question is presented in time. *Farmers' Ins. Co. v. Dobney*, 189 U. S. 301; *Land & Water Co. v. San Jose*, 189 U. S. 179; *C., B. & Q. R. R. v. Chicago*, 166 U. S. 226, 231; *Rothschild v. Knight*, 184 U. S. 334, 339; *Furman v. Nichol*, 8 Wall. 44, 56.

Mr. Lawrence Maxwell, Jr., and Mr. Joseph S. Graydon for defendants in error:

No Federal question is presented or was properly raised.

The vessels affected by the contract were not engaged in interstate commerce. *Hanley v. Kansas City Railway*, 187 U. S. 617, does not apply. See *Lehigh Valley v. Pennsylvania*, 145 U. S. 192. The court will not assume facts to make the contract illegal. *Herpolsheimer v. Funke*, 95 N. W. Rep. 687; [182] *Jewett Publishing Co. v. Butler*, 159 Massachusetts, 517; *Mills v. Dunham*, 1 Ch. 1891, 576, 586.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action upon a contract, brought by the defendants in error to recover an instalment of money due by its terms. A judgment in their favor was sustained by the Supreme Court of the State, although the petition in error to that court set up that the contract was illegal under the act of Congress of July 2, 1890, c. 647, 26 Stat. 209. No opinion was delivered, but a certificate that this objection was relied upon and that it necessarily was considered was made part of the record by that court. Therefore the present writ of error properly was allowed. The record shows that the question

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was raised and the certificate shows that it was not treated as having been raised too late under the local procedure, a point upon which the state court is the judge. It is enough that the Federal question was raised and necessarily decided by the highest court of the State. *Farmers' & Merchants' Insurance Co. v. Dobney*, 189 U. S. 301.

The contract was an indenture between the Portsmouth and Pomeroy Packet Company, George W. and William Bay, of the first part, and the Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company, of the second part. By this instrument the parties of the first part sell to the latter two steamers, two deck barges, two coal flats and five hundred dollars in the stock of the Coney Island Wharf Boat Company, for \$30,500, to be paid as therein provided. The party of the second part also agrees to pay to the Bays \$3,600 annually in advance for five years, provided, however, that in case of opposition to its boats by other boats running from Cincinnati to Portsmouth, Ohio, or to points above Portsmouth, not including points above Syracuse, Ohio, causing it to carry freight and passengers at certain exceedingly low rates, the time of payment of the instalments shall be postponed until the opposition has ceased. It is [183] further agreed that if the opposition continues for two years without interruption, and no annual payment be made, the Bays may cancel the agreement.

"It is also agreed as a part of the consideration of this agreement" that for five years the parties of the first part, or either of them, shall not be "engaged in running or in operating, or in any way be interested in any freight and passenger packet or business, or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points; nor at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points; nor at and from Syracuse, Ohio, or points between Syracuse and Portsmouth, Ohio, to or for points below Portsmouth, Ohio," with a qualification as to the towing and barge business, so long as it does not interfere with the other party's freight and passenger business from Portsmouth to Cincinnati. "It is also understood in this agreement that the party of the second part will maintain the rates charged by the parties of the first part on busi-

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ness above Portsmouth, Ohio, said rates, however, never to exceed railroad rates between said points." The last mentioned covenants, set forth in this paragraph, are especially relied upon as making the contract illegal as in restraint of trade. The previously mentioned suspension of instalments in case of opposition rising to a certain height also is referred to as a combination to aid the purchaser in getting a monopoly of river trade between Portsmouth and Cincinnati, including, it is said, some Kentucky ports.

It might be enough, perhaps, to answer the whole contention, that it does not appear on the record that the contract necessarily contemplated commerce between the States. It would be an extravagant consequence to draw from *Hanley v. Kansas City Southern Ry.*, 187 U. S. 617, a case of a State attempting to fix rates over a railroad route passing outside its limits, that the contract was within the Sherman act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points. It may be noticed further that Ohio equally has jurisdiction on the river. *Wedding v. Meyler*, 192 [184] U. S. 573. A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts. Technically, perhaps, there might be some trouble in saying that the Supreme Court of Ohio did not decide the case on the ground that the illegality was not made out as matter of fact.

But we do not like to put our decision upon technical reasoning where there is at least a fair surmise that such reasoning does not meet the realities of the case. We will suppose then that the contract does not leave commerce among the States untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. The route mentioned is between Ohio ports. The contract, in what it especially contemplates, is a domestic contract and, so far as it is so, is shown to be valid under the local law by the decision of the Ohio court. The chief and visible object of its provisions has nothing to do with commerce among the States. That which suspends payment of instalments in case of very

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serious opposition is security against a losing bargain, not a combination to gain a monopoly. The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will.

It is argued, to be sure, that the last mentioned covenant is independent and not connected with the sale of the vessels. The contrary is manifest as a matter of good sense, and is proved even technically by the words "it is also agreed as a part of the consideration of this agreement." By these words the covenant not to do business between Cincinnati and Portsmouth for five years is imported into the sale of the ships, and made one of the conventional inducements of the purchase. The price is paid not for the vessels alone but for the vessels with the covenant. So, still more clearly, the parallel instalments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale. Presumably all that there was to sell, beside [185] certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names.

This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been no intimation from any one, we believe, that such a contract, made as part of the sale of a business and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute, *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 329, *United States v. Joint Traffic Association*, 171 U. S. 505, 568, and it was so decided in the case of a patent. *Bement v. National Harrow Co.*, 186 U. S. 70, 92. It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertakings, if the sale of a business and temporary withdrawal of the seller necessary in order to give the sale effect were to be declared illegal in every case where a nice scrutiny could discover that the covenant possibly might reach beyond the state line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed.

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It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into consideration for that which was the consideration of his debt and, in that roundabout way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases. *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64; *Bank of Australasia v. Breillat*, 6 Moore, P. C. 152, 201; *Pigot's Case*, 11 Co. Rep. 26*b*, 27*b*. The plaintiff in error did business between [186] Cincinnati and Syracuse, Ohio, and the rates referred to must be assumed to be rates within those points. If the covenant had any indirect bearing on commerce with another State, what we have said sufficiently explains why we deem it insufficient to make the whole agreement void.

Judgment affirmed.

[43]

HALE v. HENKEL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.^a

No. 340. Argued January 4, 5, 1906.—Decided March 12, 1906.

[201 U. S., 43.]

Under the practice in this country the examination of witnesses by a Federal grand jury need not be preceded by a presentment or formal indictment, but the grand jury may proceed, either upon their own knowledge or upon examination of witnesses, to inquire whether a crime cognizable by the court has been committed, and if so they may indict upon such evidence. In summoning witnesses it is sufficient to apprise them of the names of the parties with respect to whom they will be called to testify without indicating the nature of the charge against them, or laying a basis by a formal indictment. The examination of a witness before a grand jury is a "proceeding" within the meaning of the proviso to the general appropriation act

^a Writ of habeas corpus dismissed by the Circuit Court (139 Fed. 496). See p. 804.

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of 1903, that no person shall be prosecuted on account of anything which he may testify in any proceeding under the Anti-trust Law. The word should receive as wide a construction as is necessary to protect the witness in his disclosures.

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, and does not apply if the criminality is taken away. A witness is not excused from testifying before a grand jury under a statute which provides for immunity, because he may not be able, if subsequently indicted, to procure the evidence necessary to maintain his plea. The law takes no account of the practical difficulty which a party may have in procuring his testimony.

A witness cannot refuse to testify before a Federal grand jury in face of a Federal statute granting immunity from prosecution as to matters sworn to, because the immunity does not extend to prosecutions in a state court. In granting immunity the only danger to be guarded against is one within the same jurisdiction and under the same sovereignty.

The benefits of the Fifth Amendment are exclusively for a witness compelled to testify against himself in a criminal case, and he cannot set them up on behalf of any other person or individual, or of a corporation of which he is an officer or employé.

[44] A witness who cannot avail himself of the Fifth Amendment as to oral testimony, because of a statute granting him immunity from prosecution, cannot set it up as against the production of books and papers, as the same statute would equally grant him immunity in respect to matters proved thereby.

The search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel the production upon a trial of documentary evidence through a *subpoena duces tecum*.

While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, a corporation is a creature of the State, and there is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers.

There is a clear distinction between an individual and a corporation, and the latter, being a creature of the State, has not the constitutional right to refuse to submit its books and papers for an examination at the suit of the State; and an officer of a corporation which is charged with criminal violation of a statute cannot plead the criminality of the corporation as a refusal to produce its books.

Franchises of a corporation chartered by a State are, so far as they involve questions of interstate commerce, exercised in subordination to the power of Congress to regulate such commerce; and while Congress may not have general visitatorial power over State corporations, its powers in vindication of its own laws are the same as if the corporation had been created by an act of Congress.

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A corporation is but an association of individuals with a distinct name and legal entity, and in organizing itself as a collective body it waives no appropriate constitutional immunities, and although it cannot refuse to produce its books and papers it is entitled to immunity under the Fourth Amendment against *unreasonable* searches and seizures, and where an examination of its books is not authorized by an act of Congress a *subpœna duces tecum* requiring the production of practically all of its books and papers is as indefensible as a search warrant would be if couched in similar terms.

Although the *subpœna duces tecum* may be too broad in its requisition, where the witness has refused to answer any question, or to produce any books or papers, this objection would not go to the validity of the order committing him for contempt.^a

[50 L. ed., 652.] ^b

[The examination of witnesses before a grand jury need not be preceded by a presentment, indictment, or other formal charge.]

[In summoning witnesses before a grand jury it is sufficient to apprise them of the names of the parties with respect to whom they will be called upon to testify, without indicating the nature of the charge against such persons.]

[The examination of witnesses before a grand jury concerning an alleged violation of the antitrust act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), is a "proceeding" within the meaning of the proviso to the act of February 25, 1903 (32 Stat. L., 854-903, chap. 755, U. S. Comp. Stat. Supp. 1906, p. 366), that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the antitrust act is one.]

[The right of a witness to claim his privilege against self-incrimination, afforded by U. S. Const., 5th Amend., when examined concerning an alleged violation of the antitrust act of July 2, 1890, is taken away by the proviso to the act of February 25, 1903, that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of, any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the antitrust act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may

^a The foregoing syllabus and the abstracts of arguments copyrighted, 1906, by The Banks Law Publishing Co.

^b The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reporter, Book 50, p. 652, copyrighted, 1906, by the Lawyers' Co-Operative Publishing Co.

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not afford immunity from prosecution in the state courts for the offense disclosed.]

[The difficulty, if any, of procuring the testimony which a person has given on his examination before a grand jury concerning an alleged violation of the antitrust act of July 2, 1890, does not render the immunity from prosecution or forfeiture, given by the proviso to the act of February 25, 1903, insufficient to satisfy the guaranty of U. S. Const., 5th Amend., against self-incrimination.]

[The privilege against self-incrimination afforded by U. S. Const., 5th Amend., is purely personal to the witness, and he cannot claim the privilege of another person, or of the corporation of which he is an officer or employee.]

[The protection against unreasonable searches and seizures afforded by U. C. Const., 4th Amend., cannot ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers in obedience to a *subpœna duces tecum*, issued in aid of an investigation by a grand jury of an alleged violation of the antitrust act of July 2, 1890, by such corporation.]

[A corporation charged with a violation of the antitrust act of July 2, 1890, is entitled to immunity under U. S. Const., 4th Amend., from such an unreasonable search and seizure as the compulsory production before a grand jury, under a *subpœna duces tecum*, of all understandings, contracts, or correspondence between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one dozen different companies, situated in seven different states.]

THIS was an appeal from a final order of the Circuit Court made June 18, 1905, dismissing a writ of *habeas corpus* and remanding the petitioner Hale to the custody of the marshal.

The proceeding originated in a *subpœna duces tecum*, issued April 28, 1905, commanding Hale to appear before the grand jury at a time and place named, to "testify and give evidence [45] in a certain action now pending . . . in the Circuit Court of the United States for the Southern District of New York, between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company on the part of the United States, and that you bring with you and produce at the time and place aforesaid":

1. All understandings, agreements, arrangements, or con-

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tracts, whether evidenced by correspondence, memoranda, formal agreements, or other writings, between MacAndrews & Forbes Company and six other firms and corporations named, from the date of the organization of the said MacAndrews & Forbes Company.

2. All correspondence by letter or telegram between MacAndrews & Forbes Company and six other firms and corporations.

3. All reports made or accounts rendered by these six companies or corporations to the principal company.

4. Any agreements or contracts or arrangements, however evidenced, between MacAndrews & Forbes Company and the Amsterdam Supply Company or the American Tobacco Company or the Continental Company or the Consolidated Tobacco Company.

5. All letters received by the MacAndrews & Forbes Company since the date of its organization from thirteen other companies named, located in different parts of the United States and also copies of all correspondence with such companies.

Petitioner appeared before the grand jury in obedience to the subpoena, and before being sworn asked to be advised of the nature of the investigation in which he had been summoned; whether under any statute of the United States, and the specific charge, if any had been made, in order that he might learn whether or not the grand jury had any lawful right to make the inquiry, and also that he be furnished with a copy of the complaint, information or proposed indictment upon which they were acting; that he had been informed that there was no action pending in the Circuit Court as stated in the subpoena, and that the grand jury was investigating no specific charge against [46] any one, and he therefore declined to answer: First, because there was no legal warrant for his examination, and, second, because his answers might tend to incriminate him.

After stating his name, residence and the fact that he was secretary and treasurer of the MacAndrews & Forbes Company, he declined to answer all other questions in regard to the business of the company, its officers, the location of its office, or its agreement or arrangements with other compa-

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nies. He was thereupon advised by the Assistant District Attorney that this was a proceeding under the Sherman Act to protect trade and commerce against unlawful restraint and monopolies; that under the act of 1903, amendatory thereof, no person could be prosecuted or subjected to any penalty or forfeiture on account of any matter or thing concerning which he might testify or produce documentary evidence in any prosecution under said act, and that he thereby offered and assured appellant immunity from punishment. The witness still persisted in his refusal to answer all questions. He also declined to produce the papers and documents called for in the subpoena:

First. Because it would have been a physical impossibility to have gotten them together within the time allowed.

Second. Because he was advised by counsel that he was under no legal obligations to produce anything called for by the subpoena.

Third. Because they might tend to incriminate him.

Whereupon the grand jury reported the matter to the court, and made a presentment that Hale was in contempt, and that the proper proceedings should be taken. Thereupon all the parties appeared before the Circuit judge, who directed the witness to answer the questions and produce the papers. Appellant still persisting in his refusal, the Circuit judge held him to be in contempt, and committed him to the custody of the marshal until he should answer the questions and produce the papers. A writ of *habeas corpus* was thereupon sued out, and a hearing had before another judge of the same court, who discharged the writ and remanded the petitioner.

[47] *Mr. De Lancey Nicoll*, with whom *Mr. Junius Parker* and *Mr. John D. Lindsay* were on the brief, for appellant in this case and in No. 341 argued simultaneously herewith.^a

There were no facts authorizing the Circuit Court to entertain any charge against appellant. Unless the grand jury in prosecuting the investigation acted within its jurisdiction, the court had no authority to punish the witness for his supposed contumacy in refusing to answer questions. *People v. Cassels*, 5 Hill, 164; *Ex parte Fisk*, 113 U. S. 713; *Scott v.*

^a *McAllister v. Henkel*, *post*, p. 90.

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McNeal, 154 U. S. 34; *Cooley*, Const. Lim. 7th ed. p. 575; *United States v. Terry*, 39 Fed Rep. 355.

No judicial matter was pending in the Circuit Court when appellant was required to attend before the grand jury, or when the orders of May 5 and May 8 were made, in or upon which he could lawfully be required to testify or produce evidence.

Notwithstanding the *subpœna* said "in a certain action," no action was pending; there can be no action, prosecution or criminal proceeding, until after someone has been formally accused of acts constituting a criminal offense by indictment or by information. *Post v. United States*, 161 U. S. 583, 587.

Nor was there any particular charge against the corporations named in the *subpœna duces tecum*, or under investigation. The grand jury was merely engaged in an effort to find out whether they had or had not transgressed the Sherman Act.

An *ex parte* investigation, based upon mere suspicion, without any complaint or charge, and that may be without result, is not a "case" or "controversy" within the meaning of the Constitution. *Pacific Railway Commission v. Stanford*, 32 Fed. Rep. 241; *Kilbourn v. Thompson*, 103 U. S. 168; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

The grand jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation; consequently its requirement, and the orders of the court, based upon it and the witness's refusal, were *coram non judice* and void.

[48] At common law the powers of grand juries were restricted to indictments returned after the examination of witnesses, and presentments made upon their own knowledge or observation.

The former was a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by the grand jury. Blackstone, Bk. IV, c. 23.

The grand jury was continued as a part of our Federal institutions by the Fifth Amendment; but its powers and duties, not being defined by the Constitution or any Federal statute, are only such as grand juries possessed at common

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law, namely, of considering and acting upon indictments previously framed and laid before them by a known prosecutor, and of presenting facts within their own knowledge. *United States v. Mundell*, Iredell, J., 1795, 8 Virginia (6 Call), 245, 247.

No Federal statute authorizes a grand jury to inquire into matters called to their attention by the court or prosecuting attorney, where there is no specific charge against one or more individuals. Such a statute would be unconstitutional, and the idea that a grand jury has practically unlimited inquisitorial power rests, upon various loose and ill-considered utterances in reported cases. 17 Am. & Eng. Ency. 2d ed. 1279.

No case in this country holds that there can be a legitimate inquiry without a previous charge; and except in Tennessee, where there is legislative authority in respect to certain offenses, the idea of general inquisitorial power is repudiated. *Re Lester*, 77 Georgia, 143; *Lewis v. Commissioners*, 74 N. Car. 194; *Ward v. State*, 2 Missouri, 120. See also *Frisbie v. United States*, 157 U. S. 160; *People v. Kelly*, 24 N. Y. 74; *O'Hair v. People*, 32 Ill. App. 277; *Webster's Case*, 5 Greenleaf, 432; *Post v. United States*, 161 U. S. 585; *Beavers v. Henkel*, 194 U. S. 73, 84.

Although a grand jury may send for witnesses before indictment actually framed, some specific charge must be pending before them directed against a particular person or persons. *Counselman v. Hitchcock*, 142 U. S. 547; *United States v. Kilpatrick*, 16 Fed. Rep. 765; *Lloyd v. Carpenter*, 3 Pa. L. J. 188.

[49] A grand jury does not possess, and cannot, under the constitution of this State exercise, purely inquisitorial power, because such power is no sense a judicial one.

The greatest evil incident to the Star Chamber was its inquisitorial procedure. Upon suggestion or suspicion citizens were subpoenaed and subjected to examination under the *ex officio* oath. See preamble of act for the abolition of that court (July 5, 1641; 16 Charles I, c. 10; 5 S. R., 110) reciting the violation of the statute of 25 Edw. III.

To exercise judicial power there must be parties to the

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proceeding, a matter in controversy, an assertion and a denial; in short, a distinct issue to be determined. *Cooley*, Const. Lim. 132; *Matter of Pacific Railway Commission v. Stanford*, 32 Fed. Rep. 241; *Interstate Com. Com. v. Brimson*, 154 U. S. 447.

The theory of our criminal proceeding, like that of Great Britain, is accusatory and not inquisitorial. *United States v. James*, 60 Fed. Rep. 257. See opinion of Chief Justice Marshall in *United States v. Hill*, 1 Brock. C. C. 159.

Section 1 of the act of February 25, 1903, does not give the petitioner immunity from prosecution, on account of the transactions concerning which he was directed to testify and produce evidence before the grand jury, the investigation before that body not being a "proceeding, suit or prosecution" under either of the acts referred to in the act of February 25, 1903; consequently the petitioner was within the legitimate exercise of his right under the Fifth Amendment of the Constitution, when he refused to testify or produce evidence before the grand jury on the ground that by so doing he might have criminated himself.

The legislative guaranty must have a broad construction in favor of the right which it is intended to secure. *Counselman v. Hitchcock*, *supra*.

See also as to similar language in the act of February 11, 1893, *Brown v. Walker*, 161 U. S. 591; but the immunity is worthless here unless the language subsequently used, "proceeding, suit, or prosecution," embraces a grand jury investigation. If it does not, the witness is deprived of his constitutional rights; any reasonable doubt on this head should be resolved in his favor.

A witness hereafter pleading the immunity afforded by this act as a bar to criminal prosecution will be held to strict proof, especially if he seeks to plead this Federal statute as a bar to a state prosecution. See *Jack v. Kansas*, 199 U. S. 372.

An inquiry before a grand jury is not a "suit" nor a "prosecution." *Post v. United States*, *supra*; *Paul v. Virginia*, 148 U. S. 107; *State v. Wolcott*, 21 Connecticut, 279; Constitution, Fifth Amendment.

The act of February 25, 1903, is unconstitutional in that

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it undertakes to deprive the various States of their right and power to prosecute persons concerned in transactions, which violate their own laws, thus infringing upon the provision of the Tenth Amendment. *Brown v. Walker, supra*, is against this proposition, but see *Jack v. Kansas*, 199 U. S. 372, where it is in effect limited by the improbability only of state prosecution rather than the right of the State to proceed.

The order of May 5 requiring appellant to produce the papers called for in the *subpoena duces tecum* was void under the Fourth Amendment. Its enforcement would amount to the ancient seizure and search which continued by usage in England until the decision of Lord Camden in *Entick v. Carrington*, 19 How. St. Tr. 1029. See also *Boyd v. United States*, 116 U. S. 616, 626; *Hartranft's Appeal*, 85 Pa. St. 433; *Ex parte Brown*, 72 Missouri, 83; *In re Lester*, 77 Georgia, 143; *In re Morer*, 101 N. W. Rep. 588.

The writ must also particularly describe the papers desired. *Ex parte Brown, supra*; *Sandford v. Nichols*, 13 Massachusetts, 286.

A corporation is entitled to the same immunities as an individual. It cannot be compelled to incriminate itself. Wigmore on Evidence, § 2259; *Logan v. Penna. R. R. Co.*, 132 Pa. St. 403; *Santa Clara County v. Railroad Company*, 118 U. S. 394; *King of Sicilies v. Willcox*, 7 St. Tr. (N. S.) 1049.

By the express provisions of the Sherman Act corporations [51] are deemed to be persons. Section 8. A corporation can only be examined through its officers, directors or agents. In the present case the Government undertook deliberately by that method to compel the corporation to submit to examination, not as a witness, but by forcing one of its officers and directors to produce its books and papers for the sole purpose of ascertaining whether or not the corporation had committed a crime under the Sherman Act.

The rule that the protection of the Fourth and Fifth Amendments is the personal privilege of the witness and cannot be claimed for the benefit of another has no possible application to the case of an officer, director or agent of a corporation who seeks to secure to the corporation its con-

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stitutional rights and immunities; for these rights can only be asserted through its officers, directors and agents.

In this view the witness is not seeking to invoke the privilege of another, but the corporation itself invokes its own privilege in the only manner and by the only means it can employ for that purpose.

If, under these circumstances, it could be said that the corporation was a witness, and, therefore, entitled to the immunity afforded by the statute, this might, perhaps, meet our present contention. But the position of the Government is that the corporation is not protected by the statute. Its avowed purpose is to use the papers as the basis of an indictment against the corporation. See *Davies v. Lincoln National Bank*, 4 N. Y. Suppl. 373; *Rex v. Purnell*, Wilson, 239; *In re Morse*, 101 N. W. Rep. 588.

Mr. Henry W. Taft, Special Assistant to The Attorney General, with whom *The Attorney General* and *Mr. Felix H. Levy*, Special Assistant to The Attorney General, were on the brief, for the United States in this case and in No. 341 :

The procedure of a grand jury in this country at the time of the enactment of the Fifth Amendment was, and, with unimportant exceptions, has remained quite different from that of [52] the similar body in England. Under this procedure the grand jury proceeds, before a bill of indictment is framed, to investigate, at the instance of the court or of their own body or of the district attorney, a suspected or alleged crime and to determine whether it has been committed, and, if so, who committed it. In so doing they exercise broad inquisitorial powers. The administration of the criminal law in this country necessitates this procedure, and this was clearly within the common law powers of a grand jury in 1791 when the Fifth Amendment was adopted however different the usual practice in England may have been at that time.

The power of a grand jury extends to the broadest kind of an inquisitorial proceeding. Counsel for appellant have mistaken a radical change of mere procedure for an attempted enlargement of power. Or if it is a question of power, long before 1791 the American idea prevailed that the State and

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not the individual is the agency which should start a criminal prosecution; that this was vitally different from the English idea and necessarily involved radical changes in the grand jury system and the extension of its powers; and that it was with reference to such a system and such powers that the Fifth Amendment was adopted.

During the first hundred years of our independence precedents are not numerous and authority for grand jury procedure rests not so much upon adjudications of the courts, as upon practice sanctioned by long usage and general recognition.

As to power of grand jury to find indictments on its own investigations, see lectures delivered by Judge Wilson in 1791 and 1792, Works James Wilson, ed. 1896, p. 213, and charge of Judge Addison, 1791, Common Pleas Court, Fifth Circuit, Addison's Pa. Rep. Appx. 38; but see *Lloyd v. Carpenter*, 1845, 5 Penn. L. Jour. 55 and *State v. Smith*, 1838, Meigs, 99.

United States v. Mundel (1795), 8 Virginia (6 Call.), 245, does not support appellant's contention. Its tendency is the other way. See also *Ward v. State* (1829), 2 Missouri, 120; *State v. Freeman* (1842), 13 N. H. 488.

[53] It thus appears that at the date of the adoption of the Fifth Amendment and for fifty years thereafter under the procedure sanctioned by usage and precedent, an American grand jury (1) could proceed in cases other than those in which a private prosecutor presented a duly engrossed indictment, and (2) on its own motion or at the instance of the court or the prosecuting attorney, could (and necessarily by an inquisitorial method) investigate an alleged or suspected crime and after the investigation direct an indictment to be drawn.

The legality of the grand jury, without the agency of the district attorney, calling witnesses, whom they interrogated as to their knowledge concerning a Cuban expedition, was sustained, and the broad inquisitorial powers of grand juries was recognized. See report in note to § 337, Wharton's Crim. Pl. & Pr. 8th ed., and see also the charge delivered by Justice Field to a grand jury in California. 30 Fed. Cas. 994; 2 Sawyer, 667.

The limitations placed by Mr. Justice Field upon the in-

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quisitorial powers of the grand jury do not relate to matters brought to their attention either by the court or by the district attorney, and that they permit a general investigation of a crime upon the "personal knowledge" of a juror, where such knowledge goes no further than to include "facts which tend to show" that a crime has been committed, which, of course, implies the power to call witnesses other than the grand juror having such knowledge. See also *United States v. Kimball*, 117 Fed. Rep. 156; *Frisbie v. United States*, 157 U. S. 160; *United States v. Beed*, 27 Fed. Cas. 737; *United States v. Terry*, 39 Fed. Rep. 355; *United States v. McAvoy*, 18 How. Pr. 380.

In the state courts see *State v. Terry*, 30 Missouri, 368; *Ex parte Brown*, 72 Missouri, 83; *Commonwealth v. Smyth*, 11 Cush. 473; *State v. Wolcott*, 21 Connecticut, 272; *State v. Magrath*, 44 N. J. L. 227; *Blaney v. State*, 74 Maryland, 153; *People v. Northey*, 77 California, 618; *McCullough v. Commonwealth*, 67 Pa. St. 30; *Rowland v. Commonwealth*, 82 Pa. St. 405; Thompson and Merriam on Juries, §§ 612, 615; Wharton's Crim. Pl. & Pr. 8th ed. § 338. *O'Hair v. People*, 32 Ill. App. 277; *State [54] v. Smith*, Meigs, 99; *Lewis v. Board of Commissioners*, 74 N. Car. 194, and *United States v. Kilpatrick*, 16 Fed. Rep. 765, distinguished.

A specific charge against a particular person is not necessary to give the grand jury jurisdiction. The English practice of private prosecutors has never prevailed. The grand jury acts on information of the district attorney or from its own knowledge or information otherwise obtained. Thompson and Merriam on Juries, § 609; 1 Bishop's Crim. Pr. § 278; charge of Mr. Justice Field, 30 Fed. Cas. 994; *The King v. John Lukens*, 1 Dallas, 7.

In its beginnings the grand jury seems to have been devised as a convenient method to assist itinerant justices in England in detecting crime and punishing it. They seem clearly to have been expected to investigate, and originally they indicted frequently, on mere rumor. See Pollock & Maitland's History of the English Law, vol. 2, pp. 622, 639, for description of the grand jury before the time of Edward I, founded on Bracton and Britton; Bracton, "De Corona," Twiss' ed. vol. 2, c. 22, fol. 143, p. 451; Reeves' History

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English Law, vol. 1, p. 457; Stephens' History Crim. Law, vol. 1, p. 253; Stubbs' Constitutional History of England, vol. 1, p. 661 *et seq.*; *Earl of Macclesfield v. Starkey* (1684), 10 Howell's State Trials, 1330.

A specific charge involves definiteness. Date and circumstances and the technical accuracy characteristic of an indictment are not necessary to the exercise of jurisdiction by the grand jury.

A witness could object to answering a question because the proceeding was not properly inaugurated, demand a ruling by the court as to whether under the charge presented the question was admissible; and thus an investigation begun before the grand jury would soon assume the aspect of a trial in court, subverting the whole purpose of the grand jury system and seriously affecting the administration of justice.

If appellant's claim be conceded that a charge be necessary, it must follow that he can object to the admissibility of evidence [55] on the ground that it is not competent under the charge. But the granting of such a right would necessarily result in a violation of the secrecy of the proceedings of the grand jury and of the rule that a witness has no right to question the regularity of the proceedings of a grand jury. *United States v. Brown*, 1 Sawy. 533, Fed. Cas. 14671; *McGregor v. United States*, 134 Fed. Rep. 187; *United States v. Cobban*, 127 Fed. Rep. 713; *United States v. Farrington*, 5 Fed. Rep. 343; *United States v. Ambrose*, 3 Fed. Rep. 283.

The court will assume that the district attorney and the grand jury proceeded in accordance with their sworn duties and in accordance with law. *United States v. Terry*, 39 Fed. Rep. 355; *United States v. Hunter*, 15 Fed. Rep. 712; *United States v. Reed*, 2 Blatchf. 435.

A witness before a grand jury has no right to raise objections as to the constitution of that body, unless his constitutional rights are clearly in danger. *Ex parte Haymond*, 91 California, 545.

No inconvenient or unjust results can attend the adoption of the rule the Government contends for, and sound public

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policy demands that it be held that the action was properly set in motion in this case.

It was contended below that to concede inquisitorial powers to a grand jury without in every case requiring a specific charge against a particular person would open up under the guise of the administration of justice possibilities of wrong and oppression "beyond conception."

In the many jurisdictions where broader inquisitorial powers exist and have been exercised by grand juries, they have not been used as an engine of oppression. The system is surrounded with such safeguards that the danger of abuses is very remote.

The scope of the powers of a grand jury is limited by the jurisdiction of the court of which it is an appendage. *United States v. Hill*, 1 Brock. 156. It is also subject to the direction of the court and cannot effectually exercise some of its most [56] important functions without the interposition of the court. It must resort to the court to enforce by *subpœna* the attendance of witnesses, and it is only through the order of the court that witnesses may be punished for contumacy. *Commonwealth v. Bannon*, 97 Massachusetts, 214; *Heard v. Pierce*, 8 Cush. 338. The court may inquire whether the grand jury has exceeded its powers, *People v. Naughton*, 7 Abb. U. S. 421, 426; *Denning v. The State*, 22 Arkansas, 131, 132, and may punish the entire jury or any of its members. *Turk v. State*, 7 Ohio Pt. II, 240, 243; *State v. Cowan*, 1 Head, 280; *Re Ellis*, Hemp. 10. Thus, while the grand jury is an independent body, its independence is confined within well-defined limits.

Whether a cause or action under the title mentioned in the subpoena was pending is unimportant. The proceeding might have proceeded without a title. Titles of proceedings before a grand jury are invariably fictitious. *United States v. Reed*, 27 Fed. Cas. 737; *Appeal of Hartranft*, 85 Pa. St. 433.

The Fourth Amendment does not relate to the compulsory production of papers for use as evidence. *Summers v. Moseley*, 2 Cr. & M. 477; *Wertheim v. Continental R. & T. Co.*, 15 Fed. Rep. 718; *Adams v. United States*, 192 U. S. 585; *Interstate Com. Com. v. Baird*, 194 U. S. 25; *In re Moser*,

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101 N. W. Rep. 591; 1 Greenleaf, Evidence, 16th ed. § 469a; *Boyd v. United States*, 116 U. S. 616.

Unreasonableness under the Fourth Amendment cannot be predicated upon either the indefiniteness of the description of the books and papers called for in the subpoena or upon the volume of evidence and the inconvenience in producing it. *United States v. Babcock*, 3 Dillon, 567; *In re Storrer*, 63 Fed. Rep. 564; *United States v. Tilden*, 10 Ben. 566; *In re Mitchell*, 12 Abb. Pr. 249.

It was not for the witness to determine whether the description of the papers was sufficiently definite or the papers themselves material to the inquiry, or whether the production of such a volume of papers was oppressive. He must comply, so far as it was possible, with the terms of the writ and produce the [57] papers submitting, as he might be advised, any objection to their use in evidence. See note by John D. Lawson, 15 Fed. Rep. 723; see also *Doe v. Kelly*, 4 Dowl. 273; *Key v. Russell*, 7 Dowl. 693; *Amey v. Long*, 9 East, 483; *Holtz v. Schmidt*, 2 Jones & Sp. 28; *Bull v. Loveland*, 10 Pick. 9; *Chaplain v. Briscoe*, 5 Sm. & M. 198; *Corsen v. Dubois*, 1 Holt, 239; *Field v. Beaumont*, 1 Swanst. 209; *Mitchell's Case*, 12 Abb. Pr. 249; *Doe v. Clifford*, 2 C. & K. 448; *In re O'Toole*, 1 Tuck. 39. See also Wigmore on Evidence, § 2200, at page 2979.

Every person subject to the jurisdiction of a competent tribunal is bound to give testimony. This is a "solemn and important duty that every citizen owes to his country." *Ward v. State*, *supra*. He is privileged to decline only in case his answers may tend to criminate him. Our system of jurisprudence does not permit a witness to refuse to answer because he prefers not to or even because his answer will tend to degrade him, except, only, where degrading testimony is interposed solely to affect his credibility. 1 Greenl. on Ev. §§ 454, 455. See cases cited. Where the reason of the privilege ceases the privilege also ceases. Broom's Legal Maxims, 654; *Brown v. Walker*, 161 U. S. 597, 599.

The protection of the Fourth and Fifth Amendments is based alone upon the personal privilege of the witness. The objections urged by the witness cannot be relied upon for the benefit of the corporation of which he is an officer, and if

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the privilege cannot be asserted in behalf of a corporation under the Fifth Amendment it is plain that it may not be so availed under the Fourth Amendment.

Where the question of criminality is not involved, an officer of a corporation having the books of the company in his custody is bound to produce them in obedience to a *sub-pœna duces tecum*. *Wertheim v. Continental R'y & Trust Co.*, 15 Fed. Rep. 718. The same rule applies, even though the production of the evidence may tend to incriminate the corporation; one of its officers may not assert in its behalf the privilege secured to persons by the Fifth Amendment of the Constitution. See [58] *United States v. Amedy*, 11 Wheat. 412; *Beaston v. The Farmers' Bank of Delaware*, 12 Pet. 134. That word in the Fifth Amendment does not include corporations, as the mischief intended to be reached did not apply to corporations.

The privilege embodied in the Amendment is upheld on grounds which vary to some extent; but the privilege is personal and is based upon the consideration of the law for the individual in his capacity as a witness. *Brown v. Walker*, 161 U. S. 596; Best on Evidence, 9th ed. p. 113; 3 Taylor on Evidence, § 1453; 1 Greenleaf on Evidence, 16th ed. § 469*d*, and cases cited in notes; *Commonwealth v. Shaw*, 4 Cush. 594; Phillipps on Evidence, 4th Am. ed. p. 935; Starkie on Evidence, 10th Am. ed. 4; Wigmore on Evidence, § 2263; *State v. Wentworth*, 65 Maine, 234, 241; *Reynolds v. Reynolds*, 15 Cox Cr. cases, 108, 115; *Bartlett v. Lewis*, 12 C. B. (N. S.) 249, 265.

While sporadic cases look in a different direction, there have been many decisions, both in this country and in England, in which the courts have refused to permit the privilege to be asserted by an officer or employé in behalf of a corporation of which he is the representative. *New York Life Ins. Co. v. People*, 195 Illinois, 430; *In re Moser*, 101 N. W. Rep. 591; *In re Peasley*, 44 Fed. Rep. 271; *Gibbons v. Waterloo Bridge*, 5 Price, 491; *Re v. Purnell*, Wilson, 239.

MR. JUSTICE BROWN, after making the foregoing statement, delivered the opinion of the court.

Two issues are presented by the record in this case, which are so far distinct as to require separate consideration. They

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depend upon the applicability of different provisions of the Constitution, and, in determining the question of affirmance or reversal, should not be confounded. The first of these involves the immunity of the witness from oral examination; the second, the legality of his action in refusing to produce the documents called for by the *subpœna duces tecum*.

1. The appellant justifies his action in refusing to answer the [59] questions propounded to him, 1st, upon the ground that there was no specific "charge" pending before the grand jury against any particular person; 2d, that the answers would tend to criminate him.

The first objection requires a definition of the word "charge" as used in this connection, which it is not easy to furnish. An accused person is usually charged with crime by a complaint made before a committing magistrate, which has fully performed its office when the party is committed or held to bail, and it is quite unnecessary to the finding of an indictment by a grand jury; or by an information of the district attorney, which is of no legal value in prosecutions for felony; or by a presentment usually made, as in this case, for an offense committed in the presence of the jury; or by an indictment which, as often as not, is drawn after the grand jury has acted upon the testimony. If another kind of charge be contemplated, when and by whom must it be preferred? Must it be in writing, and if so, in what form? Or may it be oral? The suggestion of the witness that he should be furnished with a copy of such charge, if applicable to him is applicable to other witnesses summoned before the grand jury. Indeed, it is a novelty in criminal procedure with which we are wholly unacquainted, and one which might involve a betrayal of the secrets of the grand jury room.

Under the ancient English system, criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of the public peace and good order of society. In such cases the usual practice was to prepare the proposed indictment and lay it before the grand jury for their consideration. There was much propriety in this, as the most valuable function of the grand jury was not only to examine into the commission of crimes.

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but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will.

We are pointed to no case, however, holding that a grand jury [60] cannot proceed without the formality of a written charge. Indeed, the oath administered to the foreman, which has come down to us from the most ancient times, and is found in *Rex v. Shaftsbury*, 8 Howell's State Trials, 759, indicates that the grand jury was competent to act solely on its own volition. This oath was that "you shall diligently inquire and true presentments make of all such maters, articles, and things as shall be given to you in charge, *as of all other matters, and things as shall come to your own knowledge touching this present service,*" etc. This oath has remained substantially unchanged to the present day. There was a difference, too, in the nomenclature of the two cases of accusations by private persons and upon their own knowledge. In the former case their action was embodied in an indictment formally laid before them for their consideration; in the latter case, in the form of a presentment. Says Blackstone in his Commentaries, Book IV. page 301:

"A presentment, properly speaking, is a notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the King, as the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it."

Substantially the same language is used in 1 Chitty Crim. Law, 162.

In *United States v. Hill*, 1 Brock. 156, it was indicated by Chief Justice Marshall that a presentment and indictment are to be considered as one act, the second to be considered only as an amendment to the first, and that the usage of this country has been to pass over, unnoticed, presentments on which the attorney does not think it proper to institute proceedings.

In a case arising in Tennessee the grand jury, without the agency of the district attorney, had called witnesses before them, whom they interrogated as to their knowledge concerning the then late Cuban expedition. Mr. Justice Catron sustained the legality of the proceeding and compelled the wit-

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[61] nesses to answer. His opinion is reported in Wharton's Criminal Pleading and Practice, 8th ed. § 337. He says: "The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses; and the question here is, whether a witness thus introduced is legally bound to disclose whether a crime has been committed, and also who committed the crime." His charge contains a thorough discussion of the whole subject.

While presentments have largely fallen into disuse in this country, the practice of grand juries acting upon notice, either of their own knowledge or upon information obtained by them, and incorporating their findings in an indictment, still largely obtains. Whatever doubts there may be with regard to the early English procedure, the practice in this country, under the system of public prosecutions carried on by officers of the State appointed for that purpose, has been entirely settled since the adoption of the Constitution. In a lecture delivered by Mr. Justice Wilson of this court, who may be assumed to have known the current practice, before the students of the University of Pennsylvania, he says (Wilson's Works, vol. II, page 213) :

"It has been alleged, that grand juries are confined, in their inquiries, to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted; they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. They are not appointed for the prosecutor or for the court; they are appointed for the government and for the people; and of both the government and people it is surely the concernment that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment, which the law denounces; and that, on the other hand, innocence, however strongly assailed by accusations drawn up in regular form, and [62] by accusers, marshalled in legal array, should, on full investigation, be secure in that protection, which the law engages that she shall enjoy inviolate.

"The oath of a grand jurymen—and his oath is the commission under which he acts—assigns no limits, except those marked by diligence itself, to the course of his inquiries: Why, then, should it be circumscribed by more contracted boundaries? Shall diligent inquiry be enjoined? And shall the means and opportunities of inquiry be prohibited or restrained?"

Similar language was used by Judge Addison, President of the Court of Common Pleas, in charging the grand jury

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at the session of the Common Pleas Court in 1791 (Addison's Pa. Rep. Appx. p. 88) :

"If the grand jury, of their own knowledge, or the knowledge of any of them, or from the examination of witnesses, know of any offense committed in the county, for which no indictment is preferred to them, it is their duty, either to inform the officer, who prosecutes for the State, of the nature of the offense, and desire that an indictment for it be laid before them; or, if they do not, or if no such indictment be given them, it is their duty to give such information of it to the court; stating, without any particular form, the facts and circumstances which constitute the offense. This is called a presentment."

The practice then prevailing, with regard to the duty of grand juries, shows that a presentment may be based not only upon their own personal knowledge, but from the examination of witnesses.

While no case has arisen in this court in which the question has been distinctly presented, the authorities in the state courts largely preponderate in favor of the theory that the grand jury may act upon information received by them from the examination of witnesses without a formal indictment, or other charge previously laid before them. An analysis of cases approving of this method of procedure would unduly burden this opinion, but the following are the leading ones upon the subject: *Ward v. State*, 2 Missouri, 120; *State v. Terry*, 30 Missouri, 368; *Ex [63] parte Brown*, 72 Missouri, 83; *Commonwealth v. Smyth*, 11 Cushing, 473; *State v. Wolcott*, 21 Connecticut, 272, 280; *State v. Magrath*, 44 N. J. L. 227; *Thompson & Merriam on Juries*, §§ 615-617. In *Blaney v. Maryland*, 74 Maryland, 153, the court said:

"However restricted the functions of the grand juries may be elsewhere, we hold that in this State they have plenary inquisitorial powers, and may lawfully themselves, and upon their own motion, originate charges against offenders though no preliminary proceedings have been had before a magistrate, and though neither the court nor the state's attorney has laid the matter before them."

The rulings of the inferior Federal courts are to the same effect. Mr. Justice Field, in charging a grand jury in California (2 Sawy. 667), said to the grand jury acting upon their own knowledge:

"Not by rumors or reports, but by knowledge acquired from the evidence before you, and from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury."

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Similar language was used in *United States v. Kimball*, 117 Fed. Rep. 156, 161; *United States v. Reed*, 2 Blatch. 435, 449; *United States v. Terry*, 39 Fed. Rep. 355. And in *Frisbie v. United States*, 157 U. S. 160, it is said by Mr. Justice Brewer:

"But in this country it is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the suspected party on trial, to direct the preparation of the formal charge or indictment."

There are doubtless a few cases in the state courts which take a contrary view, but they are generally such as deal with the abuses of the system, as the indiscriminate summoning of witnesses with no definite object in view and in a spirit of meddlesome inquiry. In the most pertinent of these cases, *In re Lester*, 77 Georgia, 143, the Mayor of Savannah, who was also *ex* [64] *officio* the presiding judge of a court of record, was called upon to bring into the Superior Court the "Information Docket" of his court, to be used as evidence by the State in certain cases pending before the grand jury. It was held "that the powers of the body are inquisitorial to a certain extent is undeniable; yet they have to be exercised within well defined limits. * * * The grand jury can find no bill nor make any presentment except upon the testimony of witnesses sworn in a particular case, where the party is charged with a specified offense."

This case is readily distinguishable from the one under consideration, in the fact that the subpoena in this case did specify the action as one between the United States and the American Tobacco Company and the MacAndrews-Forbes Company; and that the Georgia Penal Code prescribed a form of oath for the grand jury, "that the evidence you shall give the grand jury on this bill of indictment (or presentment, as the case may be, here state the case), shall be the truth," etc. This seems to confine the witness to a charge already laid before the jury.

In *Lewis v. Board of Commissioners*, 74 N. Car. 194, the English practice, which requires a preliminary investigation where the accused can confront the accuser and witnesses with testimony, was adopted as more consonant to principles

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of justice and personal liberty. It was further said that none but witnesses have any business before the grand jury, and that the solicitor may not be present, even to examine them. The practice in this particular in the Federal courts has been quite the contrary.

Other cases lay down the principle that it must be made to appear to the grand jury that there is reason to believe that a crime has been committed, and that they have not the power to institute or prosecute an inquiry on the chance that some crime may be discovered. *In Matter of Morse*, 18 N. Y. Criminal Rep. 312; *State v. Adams*, 70 Tennessee, 647 (an unimportant case, turning upon a local statute). In Pennsylvania grand juries are somewhat more restricted in their powers than is usual in other States, *McCullough v. Commonwealth*, 67 Pa. St. [65] 30; *Rowand v. Commonwealth*, 82 Pa. St. 405; *Commonwealth v. Green*, 126 Pa. St. 531, and in Tennessee inquisitorial powers are granted in certain cases and withheld in others. *State v. Adams*, *supra*; *State v. Smith*, Meigs, 99.

We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them. So valuable is this inquisitorial power of the grand jury that, in States where felonies may be prosecuted by information as well as indictment, the power is ordinarily reserved to courts of impanelling grand juries for the investigation of riots, frauds and nuisances, and other cases where it is impracticable to ascertain in advance the names of the persons implicated. It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall

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be indicted. As criminal prosecutions are instituted by the State through an officer selected for that purpose, he is vested with a certain discretion with respect to the cases he will call to their attention, the number and character of the witnesses, the form in which the indictment shall be drawn, and other details of the proceedings. Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them. While the grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from their own obser- [66] vations or upon the evidence of witnesses given before them.

2. Appellant also invokes the protection of the Fifth Amendment to the Constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and in reply to various questions put to him he declined to answer, on the ground that he would thereby incriminate himself:

The answer to this is found in a proviso to the General Appropriation Act of February 25, 1903, 32 Stat. 854, 904, that "no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts," of which the Anti Trust Law is one, providing, however, that "no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a "proceeding" within the meaning of this proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures, whenever such disclosures are made in pursuance of a judicial inquiry, whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them. The word "proceeding" is not a technical one, and is aptly used

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by courts to designate an inquiry before a grand jury. It has received this interpretation in a number of cases. *Yates v. The Queen*, 14 Q. B. D. 648; *Hogan v. State*, 30 Wisconsin, 428.

The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony that may ex- [67] pose him to prosecution. If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply.

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the Amendment ceases to apply. The criminality provided against is a present, not a past criminality, which lingers only as a memory and involves no present danger of prosecution. To put an extreme case, a man in his boyhood or youth may have committed acts which the law pronounces criminal, but it would never be asserted that he would thereby be made a criminal for life. It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the Amendment ceases to apply. The extent of this immunity was fully considered by this court in *Counselman v. Hitchcock*, 142 U. S. 547, in which the immunity offered by Rev. Stat. section 860, was declared to be insufficient. In consequence of this decision an act was passed applicable to testimony before the Interstate Commerce Commission in almost the exact language of the act of February 25, 1903, above quoted. This act was declared by this court in *Brown v. Walker*, 161 U. S. 591, to afford absolute immunity against prosecution for the offense to which the question related, and

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deprived the witness of his constitutional right to refuse to answer. Indeed, the act was passed apparently to meet the declaration in *Counselman v. Hitchcock*, p. 586, that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." If the constitutional Amendment were unaffected by the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incriminate him, and would justify him in refusing to answer almost [68] any question in a criminal case, unless it clearly appeared that the immunity was not set up in good faith.

We need not restate the reasons given in *Brown v. Walker*, both in the opinion of the court, and in the dissenting opinion, wherein all the prior authorities were reviewed, and a conclusion reached by a majority of the court, which fully covers the case under consideration.

The suggestion that a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, is more fanciful than real. He would have not only his own oath in support of his immunity, but the notes often, though not always, taken of the testimony before the grand jury, as well as the testimony of the prosecuting officer, and of every member of the jury present. It is scarcely possible that all of them would have forgotten the general nature of his incriminating testimony or that any serious conflict would arise therefrom. In any event, it is a question relating to the weight of the testimony, which could scarcely be considered in determining the effect of the immunity statute. The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony. It judges of the law by the facts which each party claims, and not by what he may ultimately establish.

The further suggestion that the statute offers no immunity from prosecution in the state courts was also fully considered

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in *Brown v. Walker* and held to be no answer. The converse of this was also decided in *Jack v. Kansas*, 199 U. S. 372, namely, that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a Federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held both by this court and by the Supreme Court of Kansas that [69] the possibility that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer, and that a danger so unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. *Queen v. Boyes*, 1 B. & S. 311; *King of the Two Sicilies v. Willcox*, 7 State Trials (N. S.), 1049, 1068; *State v. March*, 1 Jones (N. Car.), 526; *State v. Thomas*, 98 N. Car. 599.

The case of *United States v. Saline Bank*, 1 Pet. 100, is not in conflict with this. That was a bill for discovery, filed by the United States against the cashier of the Saline Bank, in the District Court of the Virginia District, who pleaded that the emission of certain unlawful bills took place, within the State of Virginia, by the law whereof penalties were inflicted for such emissions. It was held that defendants were not bound to answer and subject themselves to those penalties. It is sufficient to say that the prosecution was under a state law which imposed the penalty, and that the Federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction.

But it is further insisted that while the immunity statute may protect individual witnesses it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the Fifth

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Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even [70] though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a "person" within the meaning of this Amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employes. The Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman Anti Trust Act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employes, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject? Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection. We hold that the questions should have been answered.

3. The second branch of the case relates to the non-production by the witness of the books and papers called for by the *subpœna duces tecum*. The witness put his refusal on the ground, first, that it was impossible for him to collect them within the time allowed; second, because he was advised by counsel that under the circumstances he was under no obligation to produce them; and, finally, because they might tend to incriminate him.

Had the witness relied solely upon the first ground, doubtless the court would have given him the necessary time. The last ground we have already held untenable. While the

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second ground does not set forth with technical accuracy the real rea- [71] son for declining to produce them, the witness could not be expected to speak with legal exactness, and we think is entitled to assert that the subpoena was an infringement upon the Fourth Amendment to the Constitution, which declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The construction of this amendment was exhaustively considered in the case of *Boyd v. United States*, 116 U. S. 616, which was an information *in rem* against certain cases of plate glass, alleged to have been imported in fraud of the revenue acts. On the trial it became important to show the quantity and value of the glass contained in a number of cases previously imported; and the district judge, under section 5 of the act of June 22, 1874, directed a notice to be given to the claimants, requiring them to produce the invoice of these cases under penalty that the allegations respecting their contents should be taken as confessed. We held (p. 622) "that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be," and that the order in question was an unreasonable search and seizure within that Amendment.

The history of this provision of the Constitution and its connection with the former practice of general warrants, or writs of assistance, was given at great length, and the conclusion reached that the compulsory extortion of a man's own testimony, or of his private papers, to connect him with a crime or a forfeiture of his goods, is illegal (p. 634), "is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the Fourth Amendment.

[72] Subsequent cases treat the Fourth and Fifth Amendments as quite distinct, having different histories, and per-

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forming separate functions. Thus in the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, the constitutionality of the Interstate Commerce Act, so far as it authorized the Circuit Courts to use their processes in aid of inquiries before the Commission, was sustained, the court observing in that connection:

"It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case."

The case of *Adams v. New York*, 192 U. S. 585, which was a writ of error to the Supreme Court of the State of New York, involving the seizure of certain gambling paraphernalia, was treated as involving the construction of the Fourth and Fifth Amendments to the Federal Constitution. It was held, in substance, that the fact that papers pertinent to the issue may have been illegally taken from the possession of the party against whom they are offered, was not a valid objection to their admissibility; that the admission, as evidence in a criminal trial of papers found in the execution of a valid search warrant prior to the indictment, was not an infringement of the Fifth Amendment, and that by the introduction of such evidence defendant was not compelled to incriminate himself. The substance of the opinion is contained in the following paragraph. It was contended that "if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these Amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the house of the citizen or the unwarranted seizure of his papers and property, and to [73] render invalid legislation or judicial procedure having such effect."

The Boyd case must also be read in connection with the still later case of *Interstate Commerce Commission v. Baird*, 194 U. S. 25, which arose upon the petition of the Commission for orders requiring the testimony of witnesses and

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the production of certain books, papers and documents. The case grew out of a complaint against certain railway companies that they charged unreasonable and unjust rates for the transportation of anthracite coal. Objection was made to the production of certain contracts between these companies upon the ground that it would compel the witnesses to furnish evidence against themselves in violation of the Fifth Amendment, and would also subject the parties to unreasonable searches and seizures. It was held that the Circuit Court erred in holding the contracts to be irrelevant, and in refusing to order their production as evidence by the witnesses who were parties to the appeal. In delivering the opinion of the court the Boyd case was again considered in connection with the Fourth and Fifth Amendments, and the remark made by Mr. Justice Day that the immunity statute of 1893 "protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate."

Having already held that by reason of the immunity act of 1903, the witness could not avail himself of the Fifth Amendment, it follows that he cannot set up that Amendment as against the production of the books and papers, since in respect to these he would also be protected by the immunity act. We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpœna duces tecum*, the production, upon a trial in court, of documentary evidence. As remarked in *Summers v. Moseley*, 2 Cr. & M. 477, it would be "utterly impossible to carry on the administration of justice" without this writ. The following authorities are conclusive upon this question: *Amey v. Long*, 9 East, 473; *Bull v. Love*- [74] *land*, 10 Pick. 9; *U. S. Express Co. v. Henderson*, 69 Iowa, 40; *Greenleaf on Evidence*, 469a.

If, whenever an officer or employé of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness

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was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to [75] act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposi-

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tion is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations.

4. Although, for the reasons above stated, we are of the [76] opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. *Gulf &c. Railroad Company v. Ellis*, 165 U. S. 150, 154, and cases cited. Corporations are a necessary

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feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd* case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpœna duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different States in the Union.

If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or *subpœna*. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of

Harlan, J., concurring.

such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. *Ex parte Brown*, 72 Missouri, 83; *Shaftsbury v. Arrowsmith*, 4 Ves. 66; *Lee v. Angas*, L. R. 2 Eq. 59.

Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment.

But this objection to the subpoena does not go to the validity of the order remanding the petitioner, which is, therefore,
Affirmed.

MR. JUSTICE HARLAN, concurring.

I concur entirely in what is said in the opinion of the court [78] in reference to the powers and functions of the grand jury and as to the scope of the Fifth Amendment to the Constitution. I concur also in the affirmance of the judgment, but must withhold my assent to some of the views expressed in the opinion. It seems to me that the witness was not entitled to assert, as a reason for not obeying the order of the court, that the *subpœna duces tecum* was an infringement of the Fourth Amendment, which declares that "the right of the *People* to be secure in their *persons*, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be seized." It may be, I am inclined to think as a matter of procedure and practice, that the *subpœna duces tecum* was too broad and indefinite. But the action of the court in that regard was, at the utmost, only error, and that error did not affect its jurisdiction to make the order, nor authorize the witness—whose personal rights, let it be observed, were in no wise involved in the pending inquiry—to refuse compliance with the subpoena, upon the ground that it involved an unreasonable search and seizure of the books, papers and records of the corporation whose conduct, so far as it related to the Sherman Anti Trust Act, was the subject of examination. It was

McKenna, J., concurring.

not his privilege to stand between the corporation and the Government in the investigation before the grand jury. In my opinion, a corporation—"an artificial being, invisible, intangible and existing only in contemplation of law"—cannot claim the immunity given by the Fourth Amendment; for, it is not a part of the "People," within the meaning of that Amendment. Nor is it embraced by the word "persons" in the Amendment. If a contrary view obtains, the power of the Government by its representatives to look into the books, records and papers of a corporation of its own creation, to ascertain whether that corporation has obeyed or is defying the law, will be greatly curtailed, if not destroyed. If a corporation, when its affairs are under examination by a grand jury [79] proceeding in its work under the orders of the court, can plead the immunity given by the Fourth Amendment against unreasonable searches and seizures, may it not equally rely upon that Amendment to protect it even against a statute authorizing or directing the examination by the agents of the Government creating it, of its papers, documents and records, unless they specify the particular papers, documents and records to be examined? If the order of the court below is to be deemed invalid as an unreasonable search and seizure of the papers, books and records of the corporation, could it be deemed valid if made under the express authority of an act of Congress? Congress could not, any more than a court, authorize an unreasonable seizure or search in violation of the Fourth Amendment. In my judgment when a grand jury seeking, in the discharge of its public duties, to ascertain whether a corporation has violated the law in any particular, requires the production of the books, papers and records of such corporation, no officer of that corporation can rightfully refuse, when ordered to do so by the court, to produce such books, papers and records in his official custody, upon the ground simply that the order was, as to the corporation, an unreasonable search and seizure within the meaning of the Fourth Amendment.

MR. JUSTICE MCKENNA, also concurring.

I concur in the judgment but not in all the propositions declared by the court. I think the subpoena is sufficiently

McKenna, J., concurring.

definite. The charge pending was a violation of the Anti Trust Act of 1890. The documents and papers sought were the understandings and agreements of the accused companies. That the documents commanded were many or evidenced transactions occurring through a period of time are not circumstances fatal to the validity of the subpoena. If there was a violation of the Anti Trust Act, that is, combinations in restraint of trade, it would be probably evidenced by formal agreements, but it might also be evidenced or its transactions alluded to in tele- [80] grams and letters sent during the time the combination operated. Each telegram, each letter, would contribute proof, and therefore material testimony. Why then should they not be produced? What answer is given? It is said the subpoena is tantamount to requiring all the books, papers and documents found in the office of the MacAndrews & Forbes Company, and an embarrassment is conjectured as a result to its business. These, then, I assume, are the detrimental consequences that will be produced by obedience to the subpoena. If such consequences could be granted they are not fatal to the subpoena. But they may be denied. There can be at most but a temporary use of the books, and this can be accommodated to the convenience of parties. It is matter for the court, and we cannot assume that the court will fail of consideration for the interest of parties or subject them to more inconvenience than the demands of justice may require.

I cannot think that the consequences mentioned are important or necessary to the argument. A more serious matter is the application of the Fourth Amendment of the Constitution of the United States.

It is said "a search implies a quest by an officer of the law; a seizure contemplates a forcible dispossession of the owner." Nothing can be more direct and plain; nothing more expressive to distinguish a subpoena from a search warrant. Can a subpoena lose this essential distinction from a search warrant by the generality or speciality of its terms? I think not. The distinction is based upon what is authorized or directed to be done—not upon the form of words by which the authority or command is given. "The quest of an officer" acts upon the things themselves—may be secret, in-

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trusive, accompanied by force. The service of a subpoena is but the delivery of a paper to a party—is open and above-board. There is no element of trespass or force in it. It does not disturb the possession of property. It cannot be finally enforced except after challenge, and a judgment of the court upon the challenge. This is a safeguard against abuse the same as it is of other processes of the [81] law, and it is all that can be allowed without serious embarrassment to the administration of justice. Of course, it constrains the will of parties, subjects their property to the uses of proof. But we are surely not prepared to say that such uses are unreasonable or are sacrifices which the law may not demand.

However, I may apprehend consequences that the opinion does not intend. It seems to be admitted that many, if not all, of the documents may ultimately be required, but it is said "some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for their production." This intimates a different objection to the order of the court than the generality of the subpoena, and, if good at all, would be good even though few instead of many documents had been required or described ever so specifically. I am constrained to dissent from it. The materiality of his testimony is not open to a witness to determine, and the order of proof is for the court. Besides, if a grand jury may investigate without specific charge, may investigate upon the suggestion of one of its members, must it demonstrate the materiality of every piece of testimony it calls for before it can require the testimony? So limit the power of a grand jury and you may make it impotent in cases where it needs power most and in which its function can best be exercised.

But what does the record show? It shows that Hale refused to give the testimony that, this court says, should have preceded the order under review. He refused to answer what the business of the MacAndrew & Forbes Company was or where its office was, or whether there was an agreement with the company and the American Tobacco Company in regard

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to the products of their respective businesses or whether the company he represented sold its products throughout the United States. The ground of refusal was that there was no legal warrant or authority for his examination, not that the documents or tes- [82] timony was not material or not shown to be material. Besides, after objection made to the laying of a foundation, complaint cannot be made that no foundation was laid. And it seems to be an afterthought in the proceedings on *habeas corpus* that the ground objection to examination did not exclusively refer to the want of power in the grand jury.

By virtue of its dominion over interstate commerce Congress has power, the opinion of the court asserts, over corporations engaged in that commerce. And the power is the same as if the corporations had been created by Congress. And yet it is said to be a power subject to the limitation of the Fourth Amendment. To this I am not prepared to assent. I have already pointed out the essential distinction between a *subpoena duces tecum* and a search warrant, and, it may be, the case at bar demands from me no expression of opinion of the Fourth Amendment. And I am mindful, too, of the reservation in the opinion of the court of the power of Congress to require by direct legislation the fullest disclosures of their affairs from corporations engaged in interstate commerce. While recognizing this may be true, and, that until such power is exercised, there may be reasons for holding that corporations are entitled to the protection of the Fourth Amendment, there are reasons against the contention, and I wish to guard against any action which would preclude against their consideration in cases where the Fourth Amendment may be a more determining factor than it is in the case at bar. There are certainly strong reasons for the contention that if corporations cannot plead the immunity of the Fifth Amendment, they cannot plead the immunity of the Fourth Amendment. The protection of both Amendments, it can be contended, is against the compulsory production of evidence to be used in criminal trials. Such warrants are used in aid of public prosecutions (Cooley Constitutional Lim. 6th ed. 364), and in *Boyd v. United States*, 116 U. S. 616, a relation between the

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Fourth Amendment and the Fifth Amendment was declared. It was said the Amendments throw great light on each other, "for the 'unreasonable searches and seizures' con-[83] demned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd v. United States* is still recognized, and if its reasoning remains unimpaired, and the purpose and effect of the Fourth Amendment receives illumination from the Fifth, or, to express the idea differently, if the Amendments are the complements of each other, directed against the different ways by which a man's immunity from giving evidence against himself may be violated, it would seem a strong, if not an inevitable conclusion, that if corporations have not such immunity they can no more claim the protection of the Fourth Amendment than they can of the Fifth.

MR. JUSTICE BREWER, with whom the CHIEF JUSTICE concurred, dissenting.

With what is said in the opinion of the court of the necessity of a "charge," with the proposition that the immunity granted by the Federal statute is sufficient protection against both the Nation and the several States, with the holding that the protection accorded by the Fifth Amendment to the Constitution is personal to the individual and does not extend to an agent of an individual or justify such agent in refusing to give testimony incriminating his principal, and also that the *subpoena duces tecum* cannot be sustained, I fully agree.

Further, I desire to emphasize certain truths which in this and other cases decided to-day seem to be ignored or depre-

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ciated. The immunities and protection of articles 4, 5 and 14 [84] of the Amendments to the Federal Constitution are available to a corporation so far as in the nature of things they are applicable. Its property may not be taken for public use without just compensation. It cannot be subjected to unreasonable searches and seizures. It cannot be deprived of life or property without due process of law.

It may be well to compare the words of description in articles 4 and 5 with those in article 14:

"Article 4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"Article 5. No person * * * shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Article 14: * * * Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Santa Clara County v. Southern Pacific Railroad*, 118 U. S. 394, 396, Mr. Chief Justice Waite said:

"The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

See also *Pembina Mining Company v. Pennsylvania*, 125 U. S. 181; *Missouri Pacific Railway Company v. Mackey*, 127 U. S. 205; *Minneapolis & St. Louis Railway Company v. Beckwith*, 129 U. S. 26; *Charlotte &c. Railroad v. Gibbs*, 142 U. S. 386; *Monongahela Navigation Company v. United States*, 148 U. S. 312; *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 154, [85] and cases cited; *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U. S. 226.

These decisions were under the Fourteenth Amendment, but if the word "person" in that Amendment includes corporations, it also includes corporations when used in the Fourth and Fifth Amendments.

By the Fourth Amendment the "people" are guaranteed protection against unreasonable searches and seizures.

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"Citizens" is a descriptive word; no broader, to say the least, than "people."

As repeatedly held, a corporation is a citizen of a State for purposes of jurisdiction of Federal courts, and, as a citizen, it may locate mining claims under the laws of the United States, *McKinley v. Wheeler*, 130 U. S. 630, and is entitled to the benefit of the Indian Depredation Acts. *United States v. Northwestern Express Company*, 164 U. S. 686. Indeed, it is essentially but an association of individuals, to which is given certain rights and privileges, and in which is vested the legal title. The beneficial ownership is in the individuals, the corporation being simply an instrumentality by which the powers granted to these associated individuals may be exercised. As said by Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 514, 562: "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men."

United States v. Amedy, 11 Wheat. 392, was the case of an indictment under an act of Congress for destroying a vessel with intent to prejudice the underwriters. The act of Congress declared that "if any person shall * * * willfully and corruptly cast away * * * any ship or vessel * * * with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite, any policy," etc. The indictment charged an intent to defraud an incorporated insurance company, and the court held that a corporation is a person within the meaning of the act, saying (p. 412):

"The mischief intended to be reached by the statute is the [86] same, whether it respects private or corporate persons. That corporations are, in law, for civil purposes, deemed persons, is unquestionable. And the citation from 2 Inst. 736, establishes that they are so deemed within the purview of penal statutes. Lord Coke, there, in commenting on the statute of 31 Eliz. c. 7, respecting the erection of cottages, where the word used is, 'no person shall,' etc., says, 'this extends as well to persons politic and incorporate, as to natural persons whatsoever.'"

Neither does the fact that a corporation is engaged in interstate commerce in any manner abridge the protection and applicable immunities accorded by the Amendments. The

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corporation of which the petitioner was an officer was chartered by a State, and over it the General Government has no more control than over an individual citizen of that State. Its power to regulate commerce does not carry with it a right to dispense with the Fourth and Fifth Amendments, to unreasonably search or seize the papers of an individual or corporation engaged in such commerce, or deprive him or it of any immunity or protection secured by either Amendment.

It is true that there is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a State has chartered it, the power is lodged in the State. If the Nation, then in the Nation, and it cannot be exercised by any other authority. It is in the nature of the power of visitation.

In Angell & Ames on Corporations, 9th ed. c. 19, §§ 684, 685, the authors say :

"To render the charters or constitutions, ordinances and by-laws of corporations of perfect obligation, and generally to maintain their peace and good government, these bodies are subject to visitation; or, in other words, to the inspection and control of tribunals recognized by the laws of the land. Civil corporations are visited by the Government itself, through the medium of the courts of justice; but the internal affairs of ecclesiastical and eleemosynary corporations are, in general, inspected and controlled by a private visitor.

[87] "In this country, where there is no individual founder or donor, the legislature are the visitors of all corporations founded by them for public purposes, and may direct judicial proceedings against them for abuse or neglects which at common law would cause a forfeiture of their charters."

The matter is discussed in Blackstone's Commentaries, in par. 3, chap. 18, Book I, and he says :

"I proceed, therefore, next to inquire how these corporations may be visited. For corporations, being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil or eleemosynary."

And in respect to civil corporations he adds, same paragraph and chapter (*782) :

"The law having by immemorial usage appointed them to be visited and inspected by the King, their founder, in His Majesty's Court of King's Bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority."

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In 2 Kent, *300, the author says:

"The visitation of civil corporations is by the Government itself, through the medium of the courts of justice."

In *Amherst Academy v. Cowsls*, 6 Pick. 427, 433, it was held that:

"Without doubt the legislature are the visitors of all corporations founded by them for public purposes, where there is no individual founder or donor, and may direct judicial process against them for abuses or neglects which by common law would cause a forfeiture of their charters."

The right of visitation is for the purpose of control and to see that the corporation keeps within the limits of its powers. It would be strange if a corporation doing business in a dozen States was subject to the visitation of each of those States, and [88] compelled to regulate its actions according to the judgments—perhaps the conflicting judgments—of the several legislatures. The fact that a state corporation may engage in business which is within the general regulating power of the National Government does not give to Congress any right of visitation or any power to dispense with the immunities and protection of the Fourth and Fifth Amendments. The National Government has jurisdiction over crimes committed within its special territorial limits. Can it dispense in such cases with these immunities and protections? No more can it do so in respect to the acts and conduct of individuals coming within its regulating power. It has the same control over commerce with foreign nations as over that between the States. *Boyd v. United States*, 116 U. S. 616, arose under the Revenue Acts, and the applicability of the Fourth and Fifth Amendments was sustained. In that case is an elaborate opinion by Mr. Justice Bradley, speaking for the court, in which the origin of the Fourth and Fifth Amendments is discussed, their relationship to each other shown, and the necessity of a constant adherence to the underlying thought of protection expressed in them strenuously insisted upon. I quote his words (p. 635):

"It may be that it (the proceeding in question) is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that con-

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stitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

Finally, as the *subpœna duces tecum* was the initiatory step in the proceedings before the grand jury against this petitioner, [89] as that is the major fact in those proceedings, and as it is agreed that it is not sustainable, it seems to me that the order adjudicating him in contempt should be set aside, and this notwithstanding that subsequently he improperly refused to answer certain questions.

The case is not parallel to that of an indictment in two counts upon which a general judgment is entered, and one of which counts is held good and the other bad, for a writ of *habeas corpus* is not a writ of error, and the order to be entered thereon is for a discharge or a remand to custody. If a discharge is ordered no punishment can be inflicted under the judgment as rendered, and if a new prosecution is instituted containing the good count a plea of former conviction will be a full defense. But in the case at bar an order for a discharge will have no such result. The *habeas corpus* statute, Rev. Stat., § 761, provides that "the court, or justice, or judge shall proceed in a summary way * * * to dispose of the party as law and justice require." Justice requires that he should not be subjected to the costs of this *habeas corpus* proceeding, or be punished for contempt when he was fully justified in disregarding the principal demand made upon him.

The order of the Circuit Court should be reversed and the case remanded with instructions to discharge the petitioner, leaving to the grand jury the right to initiate new proceedings not subject to the objections to this.

I am authorized to say that the CHIEF JUSTICE concurs in these views.

Opinion of the Court.

[90] McALISTER v. HENKEL, UNITED STATES MARSHAL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

No. 341. Argued January 4, 5, 1906.—Decided March 12, 1906.

[201 U. S., 90.]

Hale v. Henkel, ante, p. 43, followed, as to the inquisitorial powers of the Federal grand jury and the extent of privilege and immunity of a witness under the Fifth Amendment.^a

[The privilege against self-incrimination afforded by United States Constitution, Fifth Amendment, is purely personal to the witness, and he cannot claim the privilege of another person or of the corporation of which he is an officer or employee. (50 L. ed., 671.)] ^b

THE facts are stated in the opinion.

Mr. De Lancey Nicoll, with whom *Mr. Junius Parker* and *Mr. John D. Lindsay*, were on the brief, for appellant.^c

Mr. Henry W. Taft, Special Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Felix H. Levy*, Special Assistant to the Attorney General, were on the brief, for the United States.^c

MR. JUSTICE BROWN delivered the opinion of the court.

This case involves many of the questions already passed upon in the opinion in *Hale v. Henkel*, differing from that case, however, in two important particulars: First, in the fact that there was a complaint and charge made on behalf of the United States against the American Tobacco Company and the Imperial Tobacco Company under the so-called Sherman Act, and, second, that the subpoena pointed out the particular writings sought for (three agreements), giving in each case the date, the names of [91] the parties, and, in one instance, a suggestion of the contents.

The witness McAlister, who was secretary and a director of the American Tobacco Company, refused to answer or produce the documents for practically the same reasons assigned

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^b Copyrighted, 1906, by The Lawyers' Co-Operative Publishing Co.

^c See abstracts of argument in *Hale v. Henkel*, ante, p. 874, argued simultaneously herewith.

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by the appellant Hale, demanding to be advised what the suit or proceeding was, and to be furnished with a copy of the proposed indictment. A copy of one of the agreements with three English companies and certified by the Consul General of the United States is contained in the record.

For reasons already partly set forth, we think that the immunity provided by the Fifth Amendment against self-incrimination is personal to the witness himself, and that he cannot set up the privilege of another person or of a corporation as an excuse for a refusal to answer—in other words, the privilege is that of the witness himself, and not that of the party on trial. The authorities are practically uniform on this point. *Commonwealth v. Shaw*, 4 Cush. 594; *State v. Wentworth*, 65 Maine, 234, 241; *Ex parte Reynolds*, 15 Cox Criminal Cases, 108, 115. In *New York Life Insurance Co. v. People*, 195 Illinois, 430, the privilege was claimed by a corporation, but the agent of an insurance company was permitted to testify, in a suit for the recovery of a statutory penalty, to facts showing the performance by the corporation of the act prohibited. Indeed, the authorities are numerous to the effect that an officer of a corporation cannot set up the privilege of a corporation as against his testimony or the production of their books.

The questions are the same as those involved in the *Hale* case, without the objectionable feature of the subpoena, and the order of the Circuit Court is, therefore,

Affirmed.

[92] NELSON *v.* UNITED STATES.

BOSSARD *v.* SAME.

McNAIR *v.* SAME.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MINNESOTA.

Nos. 490, 491, 492. Argued January 5, 8, 1906.—Decided March 12, 1906.

[201 U. S., 92.]

In a suit in the Circuit Court of the United States brought by the United States against corporations for violations of the Anti-trust

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Law of July 2, 1890, a witness refused to answer questions or submit books to inspection before an examiner appointed by the court on the ground of immateriality, also pleading the Fifth Amendment; after the court had overruled the objections and directed him to answer he again refused and judgment in contempt was entered against him. On appeal to this court *held*, that:

Questions under the Constitution of the United States were involved and this court has jurisdiction of an appeal direct from the Circuit Court.

In such an action the books of the various defendants both before and after the alleged combination, and the contracts between them, as well as other papers referred to in the opinion, are all matters of material proof, but whether material or not the testimony must be taken and exceptions can be noted by the examiner and the materiality of the evidence passed on by the court.

Witnesses cannot take objections to materiality of evidence in order to be relieved from testifying. The tendency or effect of the testimony on the issues between the parties is no concern of theirs.

Documentary evidence in the shape of books and papers of corporations are in the possession of the officers thereof, who cannot refuse to produce them on the ground that they are not in their possession or under their control.

Hale v. Henkel, ante, p. 43, followed to the effect that officers and employes of corporations cannot, under the Fourth and Fifth Amendments, refuse to testify or produce books of corporations in suits against the corporations for violations of the Anti-trust Law of July 2, 1890, in view of the immunity given by the act of February 25, 1903.^a

[50 L. ed., 673.]^b

[Evidence, whether documentary or oral, sought to be elicited from witnesses summoned in an action brought by the United States to enjoin an alleged conspiracy by manufacturers of paper to suppress competition, in violation of the act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), by creating a general selling and distributing agent, is material, where it would tend to establish the manner in which such agent executed its functions.]

[The immateriality of the evidence sought to be elicited can not justify the refusal of witnesses to obey the orders of the Federal circuit court, requiring them to answer the questions put to them, and to produce written evidence in their possession, on their examination before a special examiner.]

^a The foregoing syllabus and the abstracts of arguments copyrighted, 1906, by The Banks Law Publishing Co.

^b The following paragraphs inclosed in brackets comprise the syllabus to this case in the U. S. Supreme Court Reports, Book 50, p. 673. Copyrighted, 1906, by the Lawyers' Co-Operative Publishing Co.

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[Objections to the materiality of the testimony are not open to consideration on a writ of error sued out by witnesses to review a judgment for contempt, entered against them for disobeying an order to testify.]

[The refusal of corporate officers to obey orders of a Federal circuit court, requiring them to produce certain documentary evidence, on their examination before a special examiner, can not be justified on the theory that such evidence was not in their possession or under their control, because their possession was not personal, but was that of the corporations.]

[The right of a witness to claim his privilege against self-incrimination, afforded by U. S. Const., 5th Amend., when examined concerning an alleged violation of the antitrust act of July 2, 1890 (28 Stat. L., 209, chap. 647, U. S. Comp. Stat., 1901, p. 3200), is taken away by the proviso to the act of February 25, 1903 (32 Stat. L., 904, chap. 755, U. S. Comp. Stat. Supp., 1903, pp. 366, 367), that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the antitrust act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford immunity from prosecution in the state courts for the offense disclosed.]

THESE writs of error submit for review a judgment in contempt entered in the case of *United States v. General Paper Company*, described in *Alexander v. United States*, *post*, p. 117. The judgment was based upon the disobedience by the plaintiffs in error to orders of the court requiring them to answer certain [93] questions and to produce certain books, documents and papers in their examination before the special examiner in pursuance to a *subpœna duces tecum* duly issued and served. The orders requiring the plaintiffs to answer were made upon petition of the United States, which exhibited the issues in the suit of *United States v. General Paper Company et al.*, stated the questions asked plaintiffs in error, and the books, documents and papers required of them.

Plaintiffs in error refused to obey the orders, and the examiner reported their disobedience to the court "for such action as the court might take for the further enforcement of its orders." In defense plaintiffs in error filed separate answers, which respectively alleged that Nelson was the president and manager of the Hennepin Paper Company; Bros-

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sard, manager and treasurer of the Itasca Company, and McNair, a director and general manager of the Northwest Paper Company. In other particulars the answers are identical except so far as the relations of plaintiffs in error to their respective corporations made a difference. Plaintiffs in error are also directors of the General Paper Company. We insert the answer of Nelson in the margin.^a

^a Now comes Benjamin F. Nelson and answering the order to show cause made in the above-entitled matter on the 15th day of September, A. D. 1905, and the petition heretofore filed in said matter by said complainant upon which said order to show cause was made, alleges and shows unto the court as follows:

That this respondent is a director and the president of Hennepin Paper Company, one of the defendants in the above-entitled matter, and is also the owner and holder of stock in said company of the par value of forty-nine thousand (\$49,000.00) dollars, and that the books and papers referred to in said order to show cause and in the petition and schedules thereto attached, upon which said order to show cause was made, are the books and papers of said Hennepin Paper Company and not of this respondent, and are subject to the control of said Hennepin Paper Company and not of this respondent; that this respondent is also a director of General Paper Company, another of the defendants in the above entitled matter, and the owner and holder of stock in said General Paper Company of the par value of two thousand two hundred and fifty dollars; that said Hennepin Paper Company and said General Paper Company have objected and do object, and this respondent has objected and does object, to the production of said books and papers for inspection by counsel for said complainant for the purpose of being offered in evidence in said cause. Said objections are based upon the following reasons:

1. That the materiality of said books and papers in the case mentioned in said order to show cause now pending in said court has not been established so as to authorize a court of equity to order their inspection, production and introduction in evidence, and that the same are not material, relevant or competent evidence in said cause; that said books and papers contain matters of importance relating to the business of said Hennepin Paper Company and said General Paper Company in no way bearing upon or touching the issues in said cause, which it would be highly injurious to the business interests of both of said companies to make public, and this respondent submits that he ought not to be required to disclose any portions of said books or papers except on a proper showing that the same are material to said cause to establish some issue therein, and a showing that the same are not privileged for the protection of the defendants above named.

2. That one of the purposes of said complainant in instituting said

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[94] The court required the questions to be answered and the books and documents to be produced and, being of opinion that the order did not constitute a final decision, refused to allow an appeal on the part of either of the plaintiffs in

cause and in making the requests mentioned in said order to show cause for the inspection, production and introduction as evidence of said books and papers, is to establish and to compel said Hennepin Paper Company and said General Paper Company, and this respondent as such director or officer of each of said defendants, to furnish to said complainant evidence tending to establish that said Hennepin Paper Company and said General Paper Company have been guilty of certain violations of the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, and the acts amendatory thereof or supplemental thereto, and to subject said Hennepin Paper Company and said General Paper Company to the penalties for such violations imposed by said act, and that to compel the production by said Hennepin Paper Company or said General Paper Company, through their officers or otherwise, of said books and papers for inspection and introduction as evidence in said cause, would be contrary to the provisions of the Fifth Amendment to the Constitution of the United States, which provides that no person shall be compelled in any criminal case to be a witness against himself, and also contrary to the provisions of the Fourth Amendment to the Constitution of the United States, which provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

3. That the alleged acts of said Hennepin Paper Company complained of by said complainant in its said original petition or bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause, would, if committed by said Hennepin Paper Company, be violations of the laws of the State of Minnesota, and would subject said Hennepin Paper Company to forfeiture of its charter and other penalties under said laws; that to compel said Hennepin Paper Company, through this respondent as one of its officers or otherwise, to produce said books and papers for inspection and introduction as evidence in said cause would be to compel it to furnish evidence tending to establish that it has been guilty of such acts and subject it to the forfeiture of its charter and other penalties aforesaid, contrary to the provisions hereinbefore mentioned of the Fourth and Fifth Amendments to the Constitution of the United States.

4. That in addition to the matters above set forth, the purpose of the complainant in instituting said cause and in making the requests mentioned in said order to show cause is to obtain from said court a decree enjoining said General Paper Company from carrying on the business for which it was incorporated, and to enjoin the carrying

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error or either of [95] the defendants in the suit or on the part of all of them jointly.

Plaintiffs in error refused to obey the order of the court, and upon the report of the examiner the judgment under re-

out of and operation under certain agency contracts and agreements existing between it and said Hennepin Paper Company, on the alleged ground that said contracts and agreements were made and are in violation of the provisions of said act of Congress; that said contracts and agreements are of great value, not only to said General Paper Company whose entire business practically rests upon them, but are also of great value to and constitute valuable property rights in each of the defendants respectively parties thereto, including the said Hennepin Paper Company, and that such injunction from carrying out said contracts and agreements and their virtual annulment thereby occasioned would result in great injury, damage or loss, not only to said General Paper Company but also to said Hennepin Paper Company and to this respondent as a stockholder in each of said companies; and that to compel the production by said Hennepin Paper Company or said General Paper Company, or either of them, through this respondent as such director or officer or otherwise, of said books and papers for inspection and introduction as evidence in said cause for the purpose aforesaid, would be contrary not only to the provisions of said Fourth and Fifth Amendments to the Constitution of the United States, but also contrary to the well established rule of the common law, as well as of equity jurisprudence, that no person will be compelled to discover any fact, either by producing documents or answering questions, which may subject him, either directly or eventually, to prosecution for a crime or to a forfeiture or penalty, or anything in the nature of a forfeiture or penalty.

Further answering, this respondent alleges and shows unto this court that all the matters concerning which the questions referred to in said petition and schedules thereto annexed were asked, and which this respondent refused to answer, as stated in said petition, came to this respondent's knowledge exclusively as president and a director of said Hennepin Paper Company, or as a director of said General Paper Company, in the conduct of matters entrusted to him as such director or president, and which said companies, from the nature of the case, were compelled to entrust to this respondent as such director or officer, and that said Hennepin Paper Company and said General Paper Company have objected and do object, and this respondent has objected and does object, to said questions and to his being required to answer the same, for reasons similar to those already set forth in respect to the production, inspection and introduction in evidence of the books and papers above mentioned, that is to say:

1. That the materiality of said questions in the cause above mentioned has not been established so as to authorize a court of equity

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view was [96] entered, fining plaintiffs in error severally \$100 "for their said disobedience of the said order, said fines to be paid to the clerk of this court for the use of the United States, as punishment for such contempt," and sen-

to order them to be answered, and that the same are not material, relevant or competent evidence in said cause.

2. That the purpose of said complainant in instituting said cause and in asking said questions is to establish and to compel said Hennepin Paper Company and said General Paper Company, through this respondent as such director or officer, to furnish to said complainant evidence tending to establish that said Hennepin Paper Company and said General Paper Company have been guilty of certain violations of the acts of Congress above referred to, and to subject them to the penalties for such violations imposed by said acts, and that to compel said defendants hereinbefore named, or either of them, through this respondent, to answer said questions would be contrary to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States.

3. That the alleged acts of said Hennepin Paper Company complained of by said complainants in its original petition or bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause, would, if committed by it, be violations of the laws of the State of Minnesota, and would subject it to forfeiture of its charter and other penalties under said laws; that to compel it through this respondent to answer the questions aforesaid would be to compel it to furnish evidence tending to establish that it has been guilty of such acts and subject it to the forfeiture of its charter and other penalties aforesaid, contrary to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States.

4. That in addition to the matters above set forth, the purpose of the complainant in instituting said cause and in asking the questions mentioned in said order to show cause is to obtain a decree enjoining said General Paper Company from carrying on the business for which it was incorporated and to enjoin the carrying out of and operation under certain agency contracts and agreements existing between it and said Hennepin Paper Company, on the alleged ground that said contracts and agreements were made and are in violation of the provisions of said acts of Congress; that said contracts and agreements are of great value not only to said General Paper Company, whose entire business practically rests upon him, but are also of great value to and constitute valuable property rights in each of the defendants respectively parties thereto, including the Hennepin Paper Company, and that such injunction from carrying out said contracts and agreements and their virtual annulment thereby occasioned would result in great injury, damage and loss, not only to said Hennepin Paper Company or said

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tencing them to be imprisoned until [97] the order of the court requiring them to testify should be complied with.

The questions on the merits in these cases are the same as those on the merits in *Alexander v. United States*, *post*, p. 117,

General Paper Company, and that to compel said Hennepin Paper Company or said General Paper Company, through this respondent, to answer the questions aforesaid in aid of the purposes aforesaid would be contrary not only to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States, but also contrary to the well established rule of the common law as well as of equity jurisprudence, that no person will be compelled to discover any fact, either by producing documents or answering questions, which may subject him, either directly or indirectly, to prosecution for a crime or to a forfeiture or penalty or anything in the nature of a forfeiture or penalty.

Further answering this respondent alleges that he ought not to be required to answer the questions or comply with the requests, or produce for inspection by counsel for the complainant or for the purpose of being offered in evidence the cause above referred to, the books and papers referred to in said order to show cause and in the petition and schedules thereto annexed, upon which said order to show cause was made, not only for the reasons hereinabove set forth, but also for the following reasons, that is to say:

1. That one of the purposes of said complainant in instituting said cause and in seeking to require this respondent to answer the questions and comply with the requests and produce for inspection by counsel for the complainant, and for the purpose of being offered in evidence in said cause the books and papers aforesaid, is to establish and to compel this respondent to furnish to said complainant evidence tending to establish that he has been guilty of certain violations of the acts of Congress hereinbefore mentioned and referred to, and to subject him to the penalties for such violations imposed by said acts, and that to compel him to answer said questions or comply with said requests or to produce for inspection or for the purpose of being offered in evidence in said cause the said books and papers would be contrary to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States.

2. That the alleged acts of said Hennepin Paper Company and of said General Paper Company complained of by the complainant in its said original petition or bill of complaint in said cause, and which said complainant is endeavoring to establish in said cause, would, if committed by said defendant companies, involve certain violations of the laws of the State of Minnesota by this respondent, and would subject him to penalties and forfeiture under said laws, and that to compel him to answer the questions or comply with the requirements aforesaid, or to produce for inspection, or for the purpose of being offered in evi-

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[98] decided this day. In those cases, however, this court had no jurisdiction and the appeals were dismissed. In the present cases we have jurisdiction, *Bessette v. W. B. Conkey*

dence in said cause, the said books and papers, would be to compel him to furnish evidence tending to establish that he has been guilty of such violations of the laws of the State of Minnesota and to subject him to the penalties and forfeitures aforesaid, contrary to the provisions hereinbefore referred to of said Fourth and Fifth Amendments to the Constitution of the United States.

3. That one of the purposes of said complainant in instituting said cause and in seeking to require this respondent to answer the questions and comply with the requests, and produce for inspection by counsel for the complainant and for the purpose of being offered in evidence in said cause, the books and papers above referred to, is to establish and compel this respondent to furnish to said complainant evidence tending to establish the allegations of the original petition or bill of complaint in said cause, which, if established, will result in subjecting this respondent to loss or detriment in the nature of a penalty or forfeiture, in that the said Hennepin Paper Company, of which this respondent is a stockholder as aforesaid, will be subjected under the laws of the State of Minnesota to the forfeiture of its charter, resulting in the virtual forfeiture of the stock of this respondent in said defendant company, and to be the loss and forfeiture to a large extent of the value of the interest of this respondent in said corporation, and in that the contracts made through said General Paper Company as its sales agent by said Hennepin Paper Company under and pursuant to the agency contracts herein referred to between said Hennepin Paper Company and said General Paper Company will be virtually annulled and the property rights of said Hennepin Paper Company in said contracts destroyed; that there are a large number of such contracts outstanding under which large sums of money are due to said Hennepin Paper Company, all of which, as this respondent is advised and believes, will be or may be forfeited and lost to said defendant and to this respondent as a stockholder therein in case the illegal combination alleged in said original petition or bill of complaint is established by the decree or judgment in said cause; and this respondent alleges that to compel him to answer the questions and comply with the requests and produce for inspection and for purpose of being offered in evidence the books and papers referred to in said order to show cause and the petition and schedules aforesaid, and which he has declined to answer and comply with or produce, if material to said cause, would be contrary to the provisions of said Fourth and Fifth Amendments to the Constitution of the United States, and also contrary to the well established rule of the common law and of equity jurisprudence, that no person will be compelled to discover any fact or matter which may subject him to forfeiture or penalty or anything in the nature of a forfeiture or penalty.

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Co., 194 U. S. 324, and directly from the Circuit Court, as questions under the Constitution of the United States are involved.

[99] In the pleadings in the original suit brought in the Circuit Court of the United States for the District of Minnesota it is respectively alleged and denied that the defendant corporations, of which plaintiffs in error are officers, had entered into an agreement, combination and conspiracy to control, regulate and monopolize not only the manufacture of newsprint and other papers, but the distribution and shipment thereof through the Middle, Southern and Western States, in violation of the Anti Trust Act of July 2, 1890. The United States sought to establish by plaintiffs in error the truth of the charge, and the subpoena served upon them was explicit as to what was required of them.

The subpoenas required plaintiffs in error to produce the account books, including the journals, ledgers and other books kept by or under the control of the companies respectively, of which plaintiffs in error were respectively officers, (a) showing the amounts, kinds and grades of paper manufactured by the respective companies and sold by or through the General Paper Company, and were shipped since the fifth of July, 1900; (b) the prices, amounts or credits received for such paper from the paper company between the fifth of July and the present time, including entries, showing the manner in which the prices and amounts received by the respective companies for any and all [100] of its products so sold have been equalized with the prices and amounts received or realized of any and all of the other defendant companies for which the paper company is or has been the exclusive agent; (c) the amounts and proportions of earnings or profits of the paper company received by the respective companies from and through the paper company, either in the form of rebates, credits or otherwise.

Second. All contracts, agreements, writings and account books, including journals, ledgers and other books, kept by or under the control of the respective companies, showing the agreement, arrangement or understanding under and pursuant to each, and the manner in which the prices and

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amounts realized by the respective companies upon the various kinds and grades of paper manufactured by it and sold by and through the paper company, are and have been, since July 5, 1900, equalized, or the profits arising from the sale of such paper distributed or apportioned, as between the respective companies and other defendants manufacturing and selling through the paper company similar kinds or grades of paper, or among all of the defendants manufacturing similar kinds or grades of paper, and then and there to testify and the truth to say, in a certain matter in controversy in said court, between the United States as complainant against the General Paper Company *et al.*, defendants, on the part of the complainant.

There is no uncertainty, therefore, either in the issue or the means of proof. In other words, the United States charges a conspiracy upon the part of the defendant corporations for the cessation of competition between the manufacturing defendants by creating a general selling and distributing agent, the General Paper Company, which restricts the output of the mills, fixes the prices of their products, determines to whom, and the terms and conditions upon which, such products shall be sold, into what States and places they shall be shipped, and what publishers and customers each mill shall supply. The means of proof of the charge are obviously the conditions of the companies before and after the formation of the paper company, [101] its organization and the purpose of its organization, the means of its operation, how and by what means it equalizes the output and price of products, and the distribution of the proceeds of their sale, and the relations and accounts between it and the other defendant companies, and their books, accounts and minutes of proceedings.

The questions were directed to these ends. They were directed to ascertain whether the prices received for the various paper materials were equalized, and whether during the time the General Paper Company was the selling agent of the materials there was in existence an arrangement whereby the prices received through the paper company were equalized between the other defendant companies. The questions were put in various ways to show such equalization and the ar-

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rangements to equalize, and to show the allowances to each mill, the fixing of definite prices, and the distribution of the balances received among the companies on the basis of their average daily output of the grade of paper inquired about. And there were also questions asked as to whether the board of directors or the executive committee of the paper company fixed the prices of paper to be paid to each of the mills by or through the paper company, and the compensation to be paid to the mills making butchers' fibre paper, because it was less profitable, and other questions as to conversations between gentlemen representing the different mills in regard to the organization of a corporation to act as general selling agent in order to eliminate competition. There were also questions as to whether the books showed the things expressed in the other questions. The objection made to each of the questions before the examiner was that the testimony sought was irrelevant, incompetent and immaterial, and counsel advised the witnesses not to answer. As to the books and papers the following is a sample of the proceedings:

"Q. Do the books, journals or ledgers of the Hennepin Paper Company show any agreement or arrangement or understanding under and pursuant to which and the manner in which the prices and amounts realized by the Hennepin Paper Company [102] upon various grades of paper manufactured by it and sold by or through the defendant the General Paper Company, are and have been, since the 5th day of July, 1900, equalized or the profits arising from the sale of such paper distributed or apportioned as between the defendants?

"MR. FLANDERS: All objections renewed, and I give the witness the same advice.

"(No answer.)

"Q. Do you refuse, Mr. Nelson, to produce the books?

"MR. FLANDERS: As I said before, you may assume for the purposes of these questions that the books and all the papers called for are present in court, but on behalf of the Hennepin Paper Company and the witness and the General Paper Company I decline to submit those to the inspection of the Government counsel.

"MR. KELLOGG: Or to allow them or any part of them to be put in evidence, Mr. Flanders?

"MR. FLANDERS: Yes."

Other facts will appear in the opinion.

Mr. James G. Flanders, with whom *Mr. Charles F. Fawcett* and *Mr. William Bruce* were on the brief, for plaintiffs in error in these cases and for appellants in Nos. 381, 382, 383, 384 and 385 argued simultaneously herewith.^a

^a *Alexander v. United States*, post, p. 945.

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The evidence, documentary and oral, which the witnesses were required to produce was not shown to be material to plaintiff's case.

The documentary evidence called for is the property of the General Paper Company or some other of the defendant corporations. The proceeding, therefore, is a method of compelling the production of books and documents belonging to parties to the suit, and it is governed by the rules prescribed for the protection of parties from whom a discovery is demanded.

The right of a plaintiff in equity to the benefit of a defendant's oath is limited to a discovery of such material facts as relate [103] to the plaintiff's case and does not extend to a discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established. 1 Daniell's Ch. Pl. & Pr. 5 Am. ed. *579, 580; Wigram's Law of Discovery, 1st Am. ed. 15; Story's Eq. Pl. §§ 565, 568.

The plaintiff must show by clear averment the materiality of the documents sought to be disclosed. This rule applies to proceedings under a statute to compel production upon or in preparation for trial. 23 Am. & Eng. Ency. of Law, 176; *Ouchyee L. & I. Co. v. Tauphaux*, 109 Fed. Rep. 547; *Condict v. Wood*, 25 N. J. L. 319; *Bank v. Mansfield*, 48 Illinois, 494; *Lester v. People*, 150 Illinois, 408; *Bentley v. People*, 104 Ill. App. 353; *Wynn v. Taylor*, 109 Ill. App. 603; *Walsh v. Press Co.*, 48 App. Div. N. Y. 333; *S. F. Copper M. & R. Co. v. Humphrey*, 111 Fed. Rep. 772; *Eschbach v. Lightner*, 34 Maryland, 528, 533; *Jenkins v. Bennett*, 40 S. Car. 393, 400; *Berry v. Matthews*, 7 Georgia, 457, 462, 463.

A plaintiff's right to any compulsory production of books is strictly limited to such documents as contain evidence relevant to his case. His right to inspect is never larger than his right to read in evidence. The defendant is not compelled to discover his evidence if it cannot tend to establish affirmatively the case of the plaintiff. Hare on Discovery, 187, 198; *Compton v. Earl Gray*, 1 Y. & J. 154; *Bolton v. Liverpool*, 3 Sim. 489; *S. C.*, 1 My. & K.; *Harris v. Harris*, 3 Hare, 450; *Van Kleeck v. Ref. Dutch Ch.*, 6 Paige, 600; *S. C.*, 20 Wend. 458.

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Before the plaintiff is entitled to the production of a given document he must show *aliunde* that its contents are such as to entitle him to read it in evidence. He cannot compel production in order to prove that he is entitled to production. Wigram's Law of Discovery, § 293; *Story v. Lennox*, 1 Myl. & Cr. 534; Langdell on Eq. Pl. § 164; *Bligh v. Benson*, 7 Price, 205; *Stroud v. Deacon*, 1 Vesey, 27; *Barnett v. Noble*, 1 Jacob & W. 227.

Any party who is required to produce his books of account or other documents, may seal such portions thereof as he swears [104] contain nothing relating to the purposes of the discovery sought, and his affidavit that the parts so sealed do not relate to the matters in litigation is sufficient protection. 23 Am. & Eng. Ency. of Law, 182; 2 Wait's Pr. 548; *Titus v. Cortelyou*, 1 Barb. 444; *Robbins v. Davis*, 1 Blatch. 238, 242; *Campbell v. French*, 2 Cox Ch. Cas. 286; *Girard v. Penswick*, 1 Wilson Ch. 222; *Pynchon v. Day*, 118 Illinois, 9.

Under Rev. Stat. § 724 it has been held that production will only be ordered where a discovery would be decreed under the same circumstances in chancery. *Jacques v. Collins*, 2 Blatch. 23. See *Caspary v. Carter*, 84 Fed. Rep. 416; *Birch-ossheim v. Brown*, 29 Fed. Rep. 341; *Ryder v. Bateman*, 93 Fed. Rep. 31; *Bloede Co. v. Bancroft & Sons Co.*, 98 Fed. Rep. 175; *Boyd v. United States*, 116 U. S. 616.

The doctrine is not confined to documentary evidence. It applies also to the case of oral testimony. The materiality of any question must be made to appear before a witness can be required to answer it and before he can be adjudged guilty of a contempt of court for a refusal to answer. The leading case is *In re William Judson*, 3 Blatch. 148. See also *In re Allis*, 44 Fed. Rep. 216; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447.

The evidence, documentary and oral, required to be produced, if material to the plaintiff's case, is in the nature of incriminating evidence which the witnesses and the defendants are privileged from furnishing to the plaintiff under the Fourth and Fifth Amendments of the Federal Constitution and the well recognized principles of equity procedure.

The discovery which by the orders appealed from the witnesses are required to make, might also tend to subject them

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to penalties and forfeitures under the laws of the State of Wisconsin. Wisconsin Statutes (1898), §§ 1747e, 1747h; *Counselman v. Hitchcock*, 142 U. S. 547; *United States v. Saline Bank*, 1 Pet. 100.

It is not within the province of Congress to suspend the operation of these state statutes or to interfere with their enforce- [105] ment in their relation to trade within the State, and therefore the immunity clause would be ineffectual to relieve the appellants against liability under the state law.

The jurisdiction of state authority over trade within the State is as exclusive and unqualified as the jurisdiction of Congress over trade between the States. *Addyston Pipe Co. v. United States*, 175 U. S. 211 (where injunction previously issued was modified to make it conform to this rule); *Allen v. Pullman Co.*, 191 U. S. 171; *National Cotton Oil Co. v. Texas*, 197 U. S. 115.

It is the settled law of this court that the Fifth Amendment has no application to state courts and their proceedings under state laws. *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Brown v. Walker*, 161 U. S. 591, distinguished.

These Amendments to the Constitution were merely declaratory of the equity and common law rules of evidence, and it was firmly settled by them at the time of the adoption of the Amendments that no person could be compelled to discover any fact, either by producing documents or answering questions, which might subject him either directly or eventually to liability to a penalty or forfeiture, or anything in the nature of a penalty or forfeiture. 1 Daniell's Chancery Pleading & Practice, 5th Am. ed. *562, 563; 2 Story's Eq. Jur. § 1494; 1 Pomeroy's Eq. Jur. 202; *Livingston v. Harris*, 3 Paige, 527; aff'd 11 Wend. 329; *Northrop v. Hatch*, 6 Connecticut, 361, 363; *Livingston v. Tompkins*, 4 Johns. Ch. 432, and cases there cited; *Vanderveer v. Holcomb*, 17 N. J. Eq. 91; *United States v. National Lead Co.*, 75 Fed. Rep. 94; *Newgold v. American Electrical & Co.*, 108 Fed. Rep. 341; *United States v. Boyd*, 116 U. S. 631.

The consequences which must result to the appellants from the passing of the decree prayed for in the complaint are in the nature of a forfeiture. They should not be required to

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furnish the evidence to subject them to such forfeiture. 13 Am. & Eng. Ency. of Law, 54.

The witnesses were entitled to decline to answer not only on [106] the ground of personal privilege, but also on the ground that their answers would be the answers of the General Paper Company and the other defendants whose officers and directors they were, and might tend to subject said defendants to fines, penalties and forfeitures and to loss or damage in the nature of a forfeiture. A corporation is a person and as such entitled to the privileges and immunities of persons. *Covington Turnpike Co. v. Sanford*, 164 U. S. 578. It performs its functions only through its officers and agents and they cannot be compelled to testify. *State v. Simmons Hardware Co.*, 15 L. R. A. 676; *Davis v. Lincoln Natl. Bank*, 4 N. Y. Supp. 373; *Bank of Oldtown v. Houlton*, 21 Maine, 502.

The orders are appealable under the judiciary act of March 3, 1891, and under the act of February 11, 1903, to expedite the determination of suits in equity under the Anti Trust Act and the Interstate Commerce Act.

In appealing from the order of the Circuit Court appellants have followed the practice indicated in the two cases of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, and *Interstate Commerce Commission v. Baird*, 194 U. S. 25. In each case it was held that the application by the Interstate Commerce Commission made a "case" and that the order denying the application was a final order and therefore appealable.

The two cases cited differ from the present ones only in this: that no action was there pending in any Circuit Court to which the proceedings to compel the testimony of witnesses and the production of books and papers could be said to be ancillary. Otherwise, however, the proceeding itself was in every substantial respect the same as that adopted in the present cases.

The words "final decree" have been given a liberal and reasonable construction as respects the right of appeal. *Eau Claire v. Payson*, 107 Fed. Rep. 552.

There may be more than one final order and more than one appeal in the same suit. *Trustees v. Greenough*, 105

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U. S. 527; *Tuttle v. Claplin*, 88 Fed. Rep. 122; *Rouse v. Letcher*, 156 U. S. 47.

[107] These proceedings are not properly incidental, but collateral, having a distinct and independent character. They belong to the class known as ancillary, in which the form is determined by the circumstances of each case. So far as the question of appealability goes, they are subject to the same rules as original and independent actions. *Krippendorf v. Hyde*, 110 U. S. 276, 280, 287; *Freeman v. Howe*, 24 How. 450, 460; *Christmas v. Russell*, 14 Wall. 69, 80; *Rouse v. Letcher*, 156 U. S. 47, 50; *Stewart v. Dunham*, 115 U. S. 61, 64; *Carey v. Houston &c. Ry. Co.*, 161 U. S. 115, 126; *Pope v. Louisville &c. Ry. Co.*, 173 U. S. 573.

The present proceedings have all the distinguishing characteristics of any suit in equity or action at law.

The test of finality as to any particular order, under the decisions of this court, is this: An order, to be appealable, or final for the purposes of appeal, must be conclusive upon the merits and must leave the matter in controversy in such a condition that if there be an affirmance here the court will have nothing to do but to execute the order it has already entered. *Bostwick v. Brinkerhoff*, 106 U. S. 3; *St. L. &c. R. Co. v. Southern Expr. Co.*, 108 U. S. 24; *Winthrop I. Co. v. Mecker*, 109 U. S. 180; *Mower v. Fletcher*, 114 U. S. 127; *Trustees v. Greenough*, 105 U. S. 527.

It has been held that the final order or decree in ancillary proceedings is governed by the same rules, in respect of appeals to the Supreme Court, as the decree in the principal suit. *Pope v. Louisville &c. Ry. Co.*, 173 U. S. 573; *Carey v. Houston &c. Ry. Co.*, 161 U. S. 115; *Rouse v. Letcher*, 156 U. S. 47.

If, however, there is any question whether the act of February 11, 1903, applies to appeals in such cases as the present, there can be no doubt of the right of appellants to obtain a review of the orders appealed from by direct appeal to the Supreme Court under the provisions of section 5 of the act of March 3, 1891. *Loeb v. Township Trustees*, 179 U. S. 472; *W. V. Tel. Co. v. A. A. R. R. Co.*, 178 U. S. 239; *Penn. Mut. L. Ins. Co. v. Austin*, 168 U. S. 685.

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[108] *Mr. Frank B. Kellogg and Mr. James M. Beck*, Special Assistants to the Attorney General, with whom *The Attorney General* was on the brief, for the United States in these cases and in Nos. 381, 382, 383, 384 and 385:

Whether finally admissible or not, the evidence should be given and received before the examiner, inasmuch as all questions of materiality, relevancy and competency must be left primarily for determination upon final hearing by the United States Circuit Court for the District of Minnesota where the cause is pending, and ultimately for decision by this court when the suit shall be considered here on appeal. *Blease v. Garlington*, 92 U. S. 1.

Had the witnesses, instead of appealing from the order and taking a writ of error from the judgment of contempt, sued out a writ of *habeas corpus*, this court would have had jurisdiction on appeal from a judgment discharging the writ. *Ekin v. United States*, 142 U. S. 651; *Horner v. United States*, 146 U. S. 120. And it is only the question of the validity of the judgment overruling their plea under the Constitution that can be considered. *In re Tyler*, 149 U. S. 164; *In re Lennon*, 166 U. S. 552. A writ of error from the judgment of contempt will bring up no other question. *Bessette v. Conkey Co.*, 194 U. S. 324.

The rule in *Blease v. Garlington* has been followed in numerous cases. *In re Allis*, 44 Fed. Rep. 216, *contra*, is not in point, and it does not appear that *Blease v. Garlington* was called to the attention of the judge deciding the case.

The evidence was material and admissible. Where the existence of the books and papers desired is established, the ability to produce them is shown, and the books and papers are apparently important and material to the case of the moving party, their production will be required. It is obviously impossible in applications of this character to determine the materiality of all of the contents of the books and papers in advance. *United States v. Babcock*, Fed. Cas. No. 14484; *Coit v. North Carolina Gold &c. Co.*, 9 Fed. Rep. 577.

There is no doubt that as a witness a party can be compelled [109] by a *subpoena duces tecum* to produce books, documents and papers in his possession in the same manner as any other witness. *Bischoffsheim v. Brown*, 29 Fed. Rep.

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341, 343. And the officers of a corporation may be required as witnesses to produce its books when the books are necessary evidence. *Wertheim v. Continental Ry. & Trust Co.*, 15 Fed. Rep. 716; *Johnson Steel Street-rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 196; *Edison Electric Light Co. v. U. S. Electric Ltg. Co.*, 44 Fed. Rep. 294; *S. C.*, 45 Fed. Rep. 55; *Johnson Co. v. North Branch Co.*, 48 Fed. Rep. 191.

Under issues of the character raised in this cause, the entire manner of conducting the business of the General Paper Company is competent and material evidence. *Interstate Commerce Commission v. Baird*, 194 U. S. 25.

The claim of privilege is solely a personal one. *Wigmore on Evidence*, §§ 2195-2210; *Brown v. Walker*, 161 U. S. 597.

These witnesses cannot claim the privilege of silence either under the general principles of common law and equity jurisprudence and procedure, or under the Fourth and Fifth Amendments.

It is true that under the ancient practice in actions at common law a party might not compel his opponent to furnish evidence as a witness. His only remedy was by way of a bill of discovery in equity. *Wigmore on Evidence*, §§ 2217, 2218. This limitation, however, never existed in equity. 1 *Greenleaf on Evidence*, 15th ed. § 361; 1 *Daniells on Ch. Prac.* 5th ed. 885, note 6; *Adams on Equity*, 7th ed. 36; *Wigmore on Evidence*, §§ 2218, 2219, pp. 3012, 3014-3016.

A party will be compelled to make a disclosure of all facts within his knowledge, or books and documents in his possession, which tend either to establish his opponent's case or to refute the position which he himself takes. *Bustros v. White*, Eng. Law Rep. Q. B. Div. 423; *Atty. Gen. v. Emerson and another*, Law Rep. 10 Q. B. Div. 191; *Arnold v. Pawtuxet Valley Water Co.*, 18 R. I. 189.

Modern legislation has made the bill of discovery an unnecessary [110] essay adjunct even in actions at law. Material evidence may now be required of a party in such actions, without resorting to this cumbersome proceeding. 1 *Pomeroy on Eq. Jur.* 2d ed. § 193; *Wigmore on Evidence*, § 2219; 14 and 15 *Victoria*, c. 99, § 6; *Rev. Stat. of Wisconsin (1898)*, § 4183, as amended by c. 244, *Laws of 1901*; *Rev. Stat.* § 858.

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The guaranty of the Fifth Amendment that no person shall be compelled in a criminal case to be a witness against himself does not protect corporations. *Brown v. Walker*, 161 U. S. 591; *Interstate Com. Com. v. Baird*, 194 U. S. 25; *Morgan v. Halberstadt*, 60 Fed. Rep. 592; *N. Y. Life Ins. Co. v. People*, 195 Illinois, 430; *State v. Jack*, 69 Kansas, 387.

In so far as the penalty or forfeiture may be criminal in its character the guaranty of the Fifth Amendment applies, and is entirely saved by the immunity statute; in so far as the penalty or forfeiture is other than criminal, in so far as it involves the loss or forfeiture of the claim to a continued violation of the laws of the land, there is no principle either of constitutional law or of equity jurisprudence which may be invoked to relieve against it.

It was settled at an early date that pecuniary loss to the witness was not one of the penalties or forfeitures intended to be protected against by the Constitution. See opinion of Chief Justice Shaw in *Bull v. Loveland*, 10 Pick. 9, which has been followed uniformly by all of the courts in the United States. 1 Greenleaf on Evidence, 15th ed. § 452; *Lowney v. Perham*, 20 Maine, 240; *Ward v. Sharp*, 15 Vermont. 115; *Harper v. Borough*, 6 Ired. 30; *Robinson v. Neal*, 21 Kentucky, 212.

It is also held that a penalty of forfeiture must be penal in its nature, as distinguished from pecuniary loss suffered as a consequence of civil liability. *Boyd v. United States*, 116 U. S. 616; *Lees v. United States*, 150 U. S. 476; *Huntington v. Attrill*, 146 U. S. 657; *Brady v. Daly*, 175 U. S. 148; *City of Atlanta v. Chattanooga Foundry & Pipe Co.*, 101 Fed. Rep. 900; *State v. Jack*, 69 Kansas. 387; *State v. Standard Oil Co.*, 61 Nebraska, 28; *Southern Ry. Co. v. Bush*, 122 Alabama, 470; *Levy v. Superior Court*, 105 California, 600; *Ames v. Kansas*, 111 U. S. 449; 3 Wigmore on Evidence, § 256; 2 Beach on Private Corporations, § 840.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

Plaintiffs in error urge three main contentions, which we will consider in their order.

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I. That the evidence, documentary and oral, which the witnesses were required to produce, was not shown to be material to plaintiff's case.

1. There are three answers to this contention. (1) The evidence is clearly material. The charge of the bill is that the defendant manufacturing corporations entered into a conspiracy and combination in violation of the act of July 2, 1890, to suppress competition between themselves, and that they accomplished this purpose by organizing the General Paper Company, and gave it certain controlling powers over the output of the mills and the prices and distribution of their products.

Before the application to the court for the orders under review there were certain facts established. It was established that in the fall of 1889 and the spring of 1900 there were preliminary meetings of the parties to ultimately form the paper company, and that it was subsequently formed by those representing the manufacturing companies, who subscribed for the stock. In July, 1900, the corporations as represented in the paper company, fourteen in all, entered into contracts with it, making it their exclusive selling agent; that each constituent manufacturing company was represented by one of its principal officers upon the board of directors of the paper company, and the number of directors have been increased as other corporations have made the paper company their selling agent. A table of the constituent companies was given and the times the companies became members of the paper company. And it was established that there was an executive committee, comprised [112] substantially of the same persons who constituted the board of directors, and that the paper company had books and records containing the minutes of the meetings of stockholders, directors and the executive committee, and that the treasurers and sales agents had presented reports to the stockholders, directors and executive committee. It was stipulated that all the subscriptions to stock of the paper company were for the benefit of some paper manufacturing company and in its name, that it was the beneficial owner thereof, and that the dividends declared thereon were its property; that said stock was from time to time allotted to

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such corporations as made contracts with the paper company, making it their exclusive selling agent upon the basis of estimated relative productions of paper. A list of the individuals to whom stock was issued, the names of the corporations represented by them, and the days of the issuances of the stock were given.

The questions were framed to prove the combination charged in the bill, and the powers and operation of the General Paper Company and the relations of the other companies to it. What the answers will show we do not know, nor what the books and documents will disclose. The organization of the paper company had a purpose, and whether it was a legal or illegal instrument for competing companies to use we do not have now to determine. By the admissions of the answers the paper company entered into contracts with those companies, became their selling agent, and was entitled to a certain percentage of the sales. Presumably it exercised its powers, made sales and received profits. In all that it did the manufacturing corporations were interested; they owned its stock, were entitled to its dividends. This we may admit for argument's sake, not prejudging in any way, may be consistent with continued competition between the companies, but it may be otherwise. At any rate, the manner in which the paper company executed its functions may be links in the evidence adduced by the United States, and this is enough to establish the materiality of the evidence.

It must not be overlooked that not only an inspection of the [113] books was refused, but questions directed to ascertain the contents of the books were objected to, not answered. We have given one illustration; we will give another. Counsel for defendant corporations stated at the examination: "That for the purpose of any question the Government counsel see fit to ask it may be assumed that all the books, papers and documents" described in the subpoena "are present here in court, and we decline to submit them to the inspection of the Government counsel." The following then took place:

"Q. State whether those books show the amounts, kinds or grades of paper manufactured by the defendant Northwest Paper Company and sold by or through the defendant General Paper Company as the ex-

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clusive sales agent of the defendant Northwest Paper Company since the 8th day of April, 1902, or since about the 1st of May, 1902, if that is the date the business commenced.

"Same objections by defendants, and the witness given the same advice.

"Q. You decline to answer?

"A. I decline on advice of attorney.

"Q. Do the books also show where the said paper so manufactured was sold and into what States and Territories it was shipped since the 8th day of April, 1902, or the 1st day of May, 1902?

"MR. FLANDERS: I wish to make the same objections, and I give the witness the same advice.

"A. Same answer."

And counsel for the United States, not only as to the matters expressed in the foregoing questions, but as to other matters which the bill charged against the companies, and which had been inquired about, said, that he desired to use the books and offer them in evidence to show such matters. An inspection of the books was refused, and all evidence of their contents withheld.

Necessarily the books contained the information. The paper company was the selling agent of the Northwest Paper Com- [114] pany and must have kept an account of its sales and into what States the paper of the company was shipped and sold. Such accounts are material and relevant to complainant's case. They may or may not, in connection with other evidence, sustain the charge of the United States, but they are elements in the proof, having tendency enough to sustain the charge to be considered material.

2. The claim of immateriality of the testimony cannot avail plaintiffs against the orders of the Circuit Court. The procedure before an examiner and his powers are explained in *Blease v. Garlington*, 92 U. S. 1. It is there said: "The examiner before whom the witnesses are orally examined is required to note exceptions; but he cannot decide upon their validity. He must take down all the examination in writing, and send it to the court with the objections noted. So, too, when depositions are taken according to the acts of Congress or otherwise, under the rules, exceptions to the testimony may be noted by the officer taking the deposition, but he is not permitted to decide upon them; and when the testimony, as reduced to writing by the examiner, or the deposition, is filed in court, further exceptions may be there taken.

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Thus both the exceptions and the testimony objected to are all before the court below, and come here upon the appeal as part of the record and proceedings there."

And an application to a court to compel the delivery of testimony in aid of the examination does not change the rule. The testimony is taken to be submitted to the court where the suit is pending and all questions upon the evidence, its materiality and sufficiency, are to be determined by it and after it by an appellate court. Even if the trial court permit the examination of witnesses orally in open court upon the hearing in cases in equity, as further said in *Blease v. Garlington*, the testimony must be taken "down or its substance stated in writing and made part of the record, or it will only be disregarded here on an appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record subject to the objection, or the ruling will not be considered by us." *Blease v. Garlington* has been applied at Circuit in a number of cases.^a

3. These writs of error are not prosecuted by the parties in the original suit, but by witnesses, to review a judgment of contempt against them for disobeying orders to testify. Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony on the issues between the parties is no concern of theirs. The basis of their privilege is different from that and entirely personal, as we shall presently see.

II. That the documentary evidence called for was not shown to be in the possession or under the control of the witnesses. This contention is untenable. The ground of it is that the possession of the witnesses was not personal, but was that of the respective corporations of which they were

^a *Thomson-Houston Elec. Co. v. Jeffrey Mfg. Co.*, 83 Fed. Rep. 614; *Maxim-Nordenfelt Guns & Am. Co., Ltd., v. Colt's Patent Firearms Mfg. Co.*, 103 Fed. Rep. 39; *Parisian Comb Co. v. Eschwege*, 92 Fed. Rep. 721; *Fayerweather v. Ritch*, 89 Fed. Rep. 529; *Appleton v. Ecaubert*, 45 Fed. Rep. 281; *Edison Elec. Lt. Co. v. U. S. Elec. Ltg. Co.*, 45 Fed. Rep. 55, 59; *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. Rep. 196; *Adee v. J. L. Mott Iron Works*, 46 Fed. Rep. 39; *Lloyd v. Pennie*, 50 Fed. Rep. 4; *Brown v. Worster*, 113 Fed. Rep. 20; *MacWilliam v. Conn. Web. Co.*, 119 Fed. Rep. 509; *Whitehead & Hoag Co. v. O'Callahan*, 139 Fed. Rep. 243.

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officers. Granting this to be so and that the witnesses could have set up whatever privileges the corporations had, nevertheless they had the custody (actual possession) of the books and were summoned from necessity as representing the corporations. It is hardly necessary to observe that the witnesses had all the possession human beings could have had or can have, and if the objection is to prevail the books of a corporation can be withdrawn from the reach of compulsory process.

It is as useless as attempting to demonstrate that twice two make four, to say that a corporation can have possession of nothing except by the human beings who are its officers, and it is to them, not the intangible being they represent and act for, [116] that the law directs its process of subpoena and must procure its evidence.

III. That the evidence, documentary and oral, required to be produced, was in the nature of incriminating evidence which the witnesses and the defendants are privileged from furnishing to the plaintiff under the provisions of the Federal Constitution and the well recognized principles of equity procedure.

This contention asserts rights personal to the plaintiffs and rights of the corporation defendants in the suit. The basis of both rights is the protection of the Fourth and Fifth Amendments to the Constitution of the United States.

The argument submitted is substantially the same as that made by appellants in *Hale v. Henkel* and *McAlister v. Henkel*. It is insisted that the immunity^a given by the act of February 25, 1903, is not as broad as the penalties and forfeitures to which the plaintiffs in error or the corporations of which they are officers will be subjected. If the immunity, it is urged, protects from the penalties of the Anti Trust Act of 1890 it does not protect, nor has Congress

^a "Provided, that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said acts: Provided further, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." Act February 25, 1903; Comp. Stats., Sup. 1903, pp. 366, 367.

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the power to protect, from the penalties of the Minnesota laws, which make criminal a combination and conspiracy in restraint of trade and subject to forfeiture the charters of corporations who become parties to such combination and conspiracy. Sections 6955, 6956, 5962, Statutes of Minnesota, 1894.

The extent of the immunity and its application to corporations was considered in *Hale v. Henkel* and *McAlister v. Henkel*, and decided adversely to the contention of plaintiffs in error.

Judgment affirmed.

[117] ALEXANDER v. UNITED STATES.

WHITING v. SAME.

STUART v. SAME.

GENERAL PAPER COMPANY v. SAME.

HARMON AND GENERAL PAPER COMPANY v.
SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF WISCONSIN.

Nos. 381, 382, 383, 384, 385. Argued January 5, 8, 1906.—Decided March 12, 1906.

[201 U. S., 117.]

In a suit in a Circuit Court of the United States brought by the United States against corporations for violations of the Anti Trust Law of July 2, 1890, a witness refused to answer questions or produce books before the examiner on the ground of immateriality, also pleading the privileges of the Fifth Amendment; the court overruled the objections and ordered the witness to answer the questions and produce the books; an appeal was taken to this court. *Held*, that:

While such an order might leave the witness no alternative except to obey or be punished for contempt it is interlocutory in the principal suit and not a final order, nor does it constitute a practically independent proceeding amounting to a final judgment, and an appeal will not lie therefrom to this court.

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If the witness refuses to obey and the court goes further and punishes him for contempt there is a right of review, and this is adequate for his protection without unduly impeding the process of the case.^a

[50 L. ed., 686.] ^b

[Orders of a Federal circuit court directing witnesses to answer the questions put to them, and produce written evidence in their possession, on their examination before a special examiner appointed in a suit brought by the United States to enjoin an alleged violation of the antitrust act of July 2, 1890 (26 Stat. L., 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200) lack the finality requisite to sustain an appeal to the Supreme Court.]

THE facts are stated in the opinion.

Mr. James G. Flanders, with whom *Mr. Charles F. Fawcett* and *Mr. William Brace* were on the brief, for appellants.^c

Mr. Frank B. Kellogg and *Mr. James M. Beck*, Special Assistants to the Attorney General, for the United States.^d

[118] MR. JUSTICE MCKENNA delivered the opinion of the court.

At the very beginning we encounter a question of jurisdiction. Are the orders of which the appellants complain appealable? The orders direct the appellants respectively to appear before Robert F. Taylor, special examiner in the case, at the time and place to be designated, and directs each of them to "answer each and every question put to them respectively by the counsel for the complainant, the United States of America," and to produce before such commissioner certain books, papers, records, documents, reports and contracts, "for the purpose of their respective examination in said cause, and for use in evidence of the complaint of the United States of America in said examination." And

^a The foregoing syllabus copyrighted, 1906, by The Banks Law Publishing Co.

^b The following paragraph comprises the syllabus to this case in the U. S. Supreme Court Reports, Book 50, p. 686. Copyrighted, 1906, by The Lawyers' Co-Operative Publishing Co.

^c For abstracts of arguments see abstracts in *Nelson v. United States*, ante, p. 920, argued simultaneously herewith.

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it is ordered that the complainant's counsel shall have the right to inspect the said books, etc., and to introduce them or any of them in evidence; but, except as necessary for such purposes, the books, etc., to remain in the custody of the appellants.

A brief statement of the proceedings is all that is necessary. The United States by its proper officers brought suit in the Circuit Court of the United States for the District of Minnesota against the General Paper Company and twenty-three other corporations, defendants, under and pursuant to the provisions of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies." It is alleged in the bill that the defendants, other than the General Paper Company and the Manufacturers' Paper Company, were engaged in the manufacture of manilla and fibre papers in active competition with one another, and that they entered into an agreement, combination and conspiracy to control, regulate and monopolize, not only the manufacture of news print, manilla, fibre and other papers, but also the distribution and shipment thereof among and throughout the Middle, Southern and Western States. The General Paper Company was the means employed to execute the combination and conspiracy. That company is a corporation organized, the bill alleges, by [119] the other defendants, under the laws of the State of Wisconsin, with a capital stock of \$100,000, divided into one thousand shares, which were distributed among and owned and held by the other defendants, in proportions based upon the average daily output of the mills of each defendant. It is authorized to become at its principal place of business the sales agent of the products of the defendants' mills in the State of Wisconsin and elsewhere. Absolute power is conferred upon it to control and restrict the output of the mills, fix the price of their products, and determine to whom and the terms and conditions upon which such products shall be sold, into what States and places they shall be shipped, and what publishers and customers each mill shall supply.

The Manufacturers' Paper Company, it is alleged, is a New York corporation, with its principal place of business in

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Chicago, and from about the year 1897 to 1902, acted as the sales agent of various manufacturers of paper for the sale of newsprint and other papers; that in 1902 it became a party to the combination and conspiracy alleged in the bill and agreed with the General Paper Company not to compete with it in certain territories.

It is admitted that, prior to the formation of the General Paper Company, the other defendants except the Manufacturers' Paper Company, were in active competition. The formation of the General Paper Company is also admitted and that it became, by contract with the defendants who manufacture paper, their selling agent. The defendants deny, however, a purpose to violate the act of July 2, 1890. The violation of that law is the issue in the case, and the bill prays an injunction against the defendants and their officers from doing the acts or executing the purpose charged against them.

In trial of the issue thus made the Circuit Court appointed Robert S. Taylor special examiner, with authority to hear and take testimony within and without the District of Minnesota, and made an order fixing the time to take the testimony for the United States the sixteenth day May, 1905, at the city of Mil- [120]waukee, State of Wisconsin. The order was duly served on the counsel of the respective parties. Thereupon the United States petitioned the Circuit Court for an order directing the clerk of the Circuit Court to issue a *subpœna duces tecum*. The subpœna was duly issued and served on the appellants as individuals and as officers of certain of the defendant companies. They appeared before the examiner in obedience to the subpœna, but, under the advice of counsel, they refused to permit the use of books or certain parts of them, and refused to answer certain questions put to them, the ground of this action being the immateriality and irrelevancy of the evidence sought to be adduced. The United States then presented a petition to the United States Circuit Court for the District of Wisconsin, which recited the issues in the case and the statement of the questions asked and the parts of the books and documents sought to be used. To this petition the appellants filed separate answers.

The answers may be regarded for our present purpose as

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identical. They allege the immateriality of the evidence and that its materiality should be established as a condition precedent to its production; that they are officers of the companies, and as such officers, the custodians of the books, papers and documents, and that the same are of interest and value to the company in its business, and the company forbids their production; that the United States seeks evidence to convict the company and the individual appellants of violations of the act of July 2, 1890, to annul the contracts and agreements of the company, and subject it and the other appellants to the penalties prescribed in that act, and to compel the company and the other appellants to furnish evidence against themselves, contrary to the provisions of the Fifth Amendment to the Constitution of the United States, which provides that no person shall be a witness against himself; also contrary to the Fourth Amendment of the Constitution of the United States, which provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated. It is also said that the alleged acts of the [121] paper company complained of in the original petition of the United States and which the United States is endeavoring to establish would, if committed by the company, be violations of the laws of Wisconsin, and would subject the company to forfeiture of its charter and other penalties under said laws, and to compel it through its officers to produce the books and documents sought would be to compel it to furnish evidence tending to establish that it has violated the law of the State, and such purpose is contrary to the provisions of the Fourth and Fifth Amendments of the Constitution of the United States.

As we have said, the court entered orders requiring the appellants to answer the questions put to them and to produce the books, papers and documents requested. Appeals were allowed to this court. To justify the appeals, appellants contend that the orders of the Circuit Court constitute practically independent proceedings and amount to final judgments. To sustain the contention, *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, and *Interstate Commerce Commission v. Baird*, 194 U. S. 25, are cited.

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Those cases rested on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences. In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further and punish the witness for contempt of its order, then arrives a right of review, and that is adequate for his protection without unduly impeding the progress of the case. Why should greater rights be given a witness to justify his contumacy when summoned before an examiner than when summoned before a court? Testimony, at times, must be taken out of court. In instances like those in the case at bar the officer who takes the testimony, having no power to [122] issue process, is given the aid of the clerk of a court of the United States; having no power to enforce obedience to the process or to command testimony, he is given the aid of the judge of the court whose clerk issued the process, and if there be disobedience of the process, or refusal to testify or to produce documents, such judge may "proceed to enforce obedience . . . or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court." Sections 868, 869, Revised Statutes. This power to punish being exercised the matter becomes personal to the witness and a judgment as to him. Prior to that the proceedings are interlocutory in the original suit. This is clearly pointed out by Circuit Judge Van Deventer, disallowing an appeal from an order like those under review, in the case of *Nelson v. United States* (No. 490), in error to the Circuit Court of the United States for the District of Minnesota. The learned judge said:

"I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to

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punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the Government, as a sovereign vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witnesses in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the parties to the principal suit cannot appeal or obtain a writ of error from that decision."

See also *Logan v. Penn. R. R. Co.*, 132 Pa. St. 403, 410.

This court having no jurisdiction, the appeals must be dismissed, and

It is so ordered.

[808] UNITED STATES *v.* ARMOUR & CO. ET AL.

(District Court, N. D. Illinois. March 21, 1906.)

[142 Fed., 808.]

CRIMINAL LAW—IMMUNITY TO ONE FURNISHING EVIDENCE OR INFORMATION—STATUTES—CORPORATIONS.—A corporation, whether state or federal, cannot claim immunity from prosecution for violation of the interstate commerce or anti-trust laws of the United States because of testimony given or evidence produced by its officers or agents before the Interstate Commerce Commission or the Commissioner of Corporations, or in any proceeding, suit, or prosecution under such laws; the right to immunity on account of evidence so given in the several cases granted by Act Feb. 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173], and Acts Feb. 14, and Feb. 25, 1903, cc. 552, 755, 32 Stat. 827, 904 [U. S. Comp. St. Supp. 1905, pp. 68, 602], being limited to individuals who as witnesses give testimony or produce evidence.

[809] UNITED STATES—EXECUTIVE DEPARTMENTS—COMMERCE AND LABOR—CREATION—STATUTES—CONSTRUCTION.—The primary purpose of Commerce and Labor Act February 14, 1903, c. 552, 32 Stat. 825 [U. S. Comp. St. Supp. 1905, p. 63], was legislative, to enable Congress by information secured through the work of officers charged with the execution of that law to pass such remedial legislation as might be found necessary, and the act must be construed in view of such purpose.

CRIMINAL LAW—IMMUNITY TO ONE FURNISHING EVIDENCE OR INFORMATION—STATUTES—HEARINGS BEFORE COMMISSIONER OF CORPORA-

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TIONS.—Section 6 of the act creating the Department of Commerce and Labor (Act Feb. 14, 1903, c. 552, 32 Stat. 827 [U. S. Comp. St. Supp. 1905, p. 68]), defining the powers and duties of the Commissioner of Corporations, requiring him to make investigation into the organization, conduct, and management of the business of all corporations or combinations engaged in interstate or foreign commerce, other than common carriers, and giving him the same powers in that respect as is conferred on the Interstate Commerce Commission with respect to carriers, including the power to subpoena and compel the attendance of witnesses, and to administer oaths and require the production of documentary evidence, contemplates that he shall proceed by private hearings; and, having such powers, a person who appears before him on his demand or by his request, and gives testimony or produces documents, although not sworn, is entitled to the same privileges and immunities as though his attendance was compelled by subpoena and his testimony given under oath.

SAME.—Act Feb. 14, 1903, c. 552, creating the Department of Commerce and Labor (32 Stat. 827 [U. S. Comp. St. Supp. 1905, p. 68]) by section 6 requires the Commissioner of Corporations to investigate all corporations and combinations engaged in interstate or foreign commerce, except common carriers, and provides that "all the requirements, obligations, liabilities, and immunities imposed or conferred by said 'Act to regulate commerce' and by 'An act in relation to testimony before the Interstate Commerce Commission' * * * shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section." The act last mentioned (Act Feb. 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173]), which is supplementary to the interstate commerce act, provides that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise before said commission or in obedience to its subpoena * * * or in any such case or proceeding." Appropriation Act Feb. 25, 1903, c. 755, 32 Stat. 904 [U. S. Comp. St. Supp. 1905, p. 602], making provision for the enforcement of the interstate commerce and anti-trust laws, contains a similar immunity provision relating to persons giving testimony or producing evidence in any proceeding, suit, or prosecution under said acts. By a resolution of the House of Representatives of March 7, 1904, the Commissioner of Corporations was directed to investigate the so-called "Beef Trust," and while proceeding thereunder certain persons by his request, but without being subpoenaed or sworn, furnished testimony and documentary evidence on which he based his report. *Held*, that the immunity provisions of the statutes set out and applicable to such investigation, to be valid, must be construed as being as broad as the privilege given by the fifth constitutional

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amendment, and that the persons so furnishing evidence could not be prosecuted for violation of the anti-trust law, on account of the transactions, matters, or things to which such evidence related.^a

Criminal Prosecution. On motion by defendants and cross-motion by the United States to direct a verdict on trial of pleas in bar.

On the 1st day of July, 1905, an indictment was returned by the grand jury of the Northern division of the Northern district of Illinois against the de- [810] fendants, charging them with conspiring in restraint of trade and commerce among the states and with foreign nations, and with an attempt to monopolize such trade and commerce, in violation of the Sherman anti-trust act. Pleas in abatement were filed attacking the organization of the grand jury, and the procedure in general, from the time the grand jury was impaneled until it returned the indictment. A demurrer was interposed to these pleas, and on argument was sustained as to all of them. A demurrer was then interposed to the indictment itself, and after full argument it was overruled as to the conspiracy counts and sustained as to the counts charging monopoly. Later, on the 23d day of October, 1905, special pleas in bar were filed, setting up that by virtue of a resolution of the House of Representatives, adopted March 7, 1904, and known as the "Martin Resolution," and also by virtue of the law creating the Bureau of Corporations, James R. Garfield, Commissioner of Corporations, had made an investigation into the business of the defendants and into the matters and things alleged in the indictment, and that the defendants upon the lawful requirement of the Commissioner of Corporations had furnished evidence, documentary and otherwise, of and concerning the matters charged in the indictment. The pleas are numerous, and are varied in form, but the above is the substance of them. Replications were filed by the United States, traversing the averments of the pleas. A jury was impaneled, and the taking of testimony was commenced on the 29th day of January, 1906.

The resolution of the House of Representatives was as follows: "Resolved, that the Secretary of Commerce and Labor be, and he is hereby, requested to investigate the causes of the low prices of beef cattle in the United States since July first, nineteen hundred and three, and the unusually large margins between the prices of beef cattle and the selling prices of fresh beef, and whether the said conditions have resulted in whole or in part from any contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several states and territories or with foreign countries; also, whether said prices have been controlled in whole or in part by any corporation, joint stock company, or corporate combination engaged in commerce among the several states or with foreign nations; and if so, to investigate the organization, capitalization, profits, conduct, and management of the business of such corporations, companies, and corporate combinations, and to make early report of his findings according to law." For the act establishing the Department of Commerce and Labor, passed February 14, 1903, see U. S. Comp. St. Supp. 1905, p. 63 (32 Stat. 825, c. 552). For the interstate commerce act and amendments thereto, portions of which are adopted and made part of the said act of commerce and

^a Syllabus and statement of the case copyrighted, 1906, by West Publishing Co.

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labor, see Fed. St. Ann. vol. 3, p. 809 et seq. (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]; Act March 2, 1889, c. 382, 25 Stat. 861 [U. S. Comp. St. 1901, p. 3168]). For the act in relation to testimony, etc., being an act supplemental to the interstate commerce acts, passed February 11, 1893, see Fed. St. Ann. vol. 3, p. 855 (27 Stat. L. 443, c. 83 [U. S. Comp. St. 1901, p. 3173]). For the Sherman anti-trust act, being the act under which the indictment was returned, passed July 2, 1890, see Fed. St. Ann. vol. 7, p. 336 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]). For the act appropriating \$500,000 for enforcement of the anti-trust and interstate commerce laws, etc., passed February 25, 1903, see 32 Stat. 904 [U. S. Comp. St. Supp. 1905, p. 602].

The resolution of the House of Representatives, set forth above, which is known as the "Martin Resolution," was passed March 7, 1904. Its passage, and the terms thereof, and the fact that the Commissioner of Corporations, Mr. James R. Garfield, was going to Chicago to make the investigation of their business thereby called for, were known to defendants from the public press. Their respective counsel thereupon investigated the law as to the powers and authority of the Commissioner of Corporations, under section 6 of the act creating that bureau (Act Feb. 14, 1903, c. 552, 32 Stat. 827 [U. S. Comp. St. Supp. 1905, p. 68]), to make such investigation and to compel the testimony of witnesses and the production of the books and records of the defendants for the purposes thereof, and advised defendants with respect thereto. Afterwards, on April 13, 1904, the Commissioner of Corporations arrived in Chicago for that purpose. He called upon Charles G. Dawes, president of the Central Trust Company of Chicago, and told him he had come [811] to Chicago to meet representatives of the packers and discuss with them this investigation, and stated his purpose in coming to Chicago to meet the representatives of the packing industries, and asked Mr. Dawes if he would introduce him to certain of the defendant packers and bring them together. He also called upon James H. Eckels, president of the Commercial National Bank of Chicago, and made a similar request. Accordingly Mr. Dawes arranged, and the Commissioner on that day had, an interview with Louis C. Krauthoff, general counsel of the Armour companies, who was authorized by his clients to meet the Commissioner, at which interview Mr. McRoberts, assistant treasurer of the Armour companies, and Mr. Dawes, were present; and Mr. Eckels in like manner arranged, and the Commissioner later on the same day held, separate meetings and interviews with Edward Swift, vice president of Swift & Co., with Edward Morris, vice president of the Fairbank Canning Company, and with Jesse P. Lyman, president of the National Packing Company.

At these interviews Mr. Garfield informed the defendants and their representatives whom he met that he was engaged in making this investigation as Commissioner of Corporations. He called to their attention the law creating his bureau and the powers thereby vested in him, and the Martin resolution of the House of Representatives, and informed them that he had come to Chicago to get from the defendants the information possessed by them, and access to their books and records, and called upon them to give him and his authorized agents such information and access. The Commissioner testified, as a witness for the government, that he had substantially the same interview with each of these persons; the interviews with Mr. Swift, Mr. Morris, and Mr. Lyman being, however, briefer than that with Mr. Krauthoff.

The substance of the interviews on April 13, 1904, were stated by the United States Attorney in his argument to the court upon these

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motions, as follows: "The Commissioner secured an introduction to them through their banker and through their mutual friend, Mr. Dawes and Mr. Eckels. He took the matter up with them as a business proposition, and said to them: 'I have come here now as Commissioner, and I wish to make an investigation, and I want you to co-operate with me. I want you to turn over this evidence. You know what my powers are, what my duties are. You know all about it.' 'Yes,' Mr. Krauthoff says, 'we are thoroughly posted on that.' He took or started to take the law from his pocket and hand it to them. Mr. Krauthoff says: 'We understand all about the law. * * * We know exactly what our rights are and we know what your rights are. * * * You need not discuss that Mr. Garfield. * * * Let us know what you want here.' Mr. Garfield said to him, and to the other gentlemen: 'I want to make an investigation. That means that I must go to your books and papers and find out what you have, and in order to make it thorough I must verify what is given to me by the books themselves.' He called for a complete investigation and examination of their affairs."

In these interviews, Mr. Garfield called their attention to the Martin resolution calling for the investigation, as well as to the act of Congress creating his bureau and the powers thereby conferred upon him, and produced the law. Intending thereby to show what the powers of the bureau were, but was informed that the defendants were aware of the provisions of the law. He stated in the interview that by this Martin resolution the House of Representatives had indicated certain specific lines of inquiry that it desired made, and in connection with the general investigation he was taking up the Martin resolution in detail; and he stated that without the information to be obtained from the defendants and from their books and records his report would be incomplete. He stated that detective methods would not be used, but said he came and would come directly to headquarters for such information as he wished, and for that purpose had met these men. Mr. Krauthoff stated to him that the Department of Justice of the government had obtained an injunction against the defendant packers, enjoining them from violation of the Sherman anti-trust act; and Mr. Garfield testified that he stated in that connection that his department and bureau were not connected with the Department of Justice; that each department was operating separately, and that the work of the Bureau of Corporations was within its own de- [812] partment; that he was not acting with or for the Department of Justice. He testified that he stated practically to the effect that the purpose of Congress in creating his department was not to disclose violations of law or to investigate prosecutions, or to act in connection with any other department of the government, but was for the purpose of developing facts, so that they might be reported to the President, and by him to Congress, for legislative purposes. Mr. Garfield testified that, in stating to Mr. Krauthoff that his department had no connection or co-operation with the Department of Justice, his impression was that that question had to do with whether or not he was acting for the Department of Justice in the collection of information, or whether he was to turn it over to the Department of Justice, and that the statement as to the injunction and as to his connection with the Department of Justice had to do with that subject-matter: that he did not recall saying in this interview (as testified to for defendants) that, if it were known that his department was used in connection with or in assistance of the Department of Justice, it would be the destruction of the usefulness of his department, but that he had stated that, or words to that effect, in his official reports that the main object for which section 6 of the

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act creating the Department of Commerce and Labor was enacted was to report to Congress for legislative purposes; that he stated in the interview with Krauthoff, in connection with his statement as to the purposes of the bureau in the matter of this investigation, that he had conferences with the President and the Secretary of the Department, and spoke with their authority and consent.

The Commissioner testified that he stated to Mr. Krauthoff it would be his duty, under the law, to report the data gathered by him to the President as he might require, who, under the terms of the law, could make such parts public as he should direct; but that he appreciated that there were certain portions of the business of the defendants (private accounts and entries of their profit and loss accounts and of their detailed costs—trade secrets—which they would desire their competitors not to know) that were not the proper subject of public inquiry and should not be made public, and that such data would not be reported even to the President, and that this policy was understood and accepted by the Secretary of the Department, Mr. Cortelyou, and by the President; that Mr. Krauthoff asked him what use the President would make of the report made to him, and he told him as to that he could not answer. He could simply say the President would do what was right. He also testified that he had previously read a pamphlet of Mr. Randolph (being an opinion by Carmen F. Randolph on the status and powers of the Bureau of Corporations, organized under section 6 of the act of Congress creating the Department of Commerce and Labor), and had in mind, in talking with Mr. Krauthoff, that there was a line of privacy which, under the Constitution, Congress could not invade, and that the question as to his investigations invading that line was a matter for discussion between them; that he stated that, on the other hand, there was a great deal of material of a purely statistical character, as to which there would be no question that it would be available for the purposes of the investigation, and that as between those two classes of information or evidence (i. e., that to which the government would be clearly entitled and that to which it would not be entitled) a great many subjects might come up during the investigation as to which there would be question; that he said to the effect that the information in the possession of the defendant packers as to their business would divide itself into three classes, viz., that to which the government was clearly entitled in and for the purposes of said investigation, that to which it was clearly not entitled, and a third class as to which there might be doubt or question; that it was not his purpose to act arbitrarily in connection with those matters; that all matters concerning which inquiry might be made by his agents, and concerning which the packers had any doubt, would be taken up for conference, for determination as to whether or not the question was proper and whether or not the information should be given; that as to all those matters they would be referred to him for conference with the packers; that the determination would result from the conference.

Krauthoff, McRoberts and Dawes testified, in effect, that the statement of Mr. Garfield as to his connection with the Department of Justice was in response to the inquiry of Mr. Krauthoff as to whether any of the information that he might obtain from the defendants or their books would be used by the Department of Justice or for its purposes and against the defendants, and that Mr. Garfield said it would not be used for that purpose, and that any such use would be guarded against, and that such information would be used solely for the purposes of the Department of Commerce and Labor, and that the defendants were protected in that respect by the law as well as by the policy of the department. These witnesses also testified that the

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Commissioner said (and a number of other witnesses for defendants testified that he said to them) that he had the right and power to get this information by a hearing in the course of which the books of the defendants would have to be brought to him, but the information would be thereby obtained in an indirect and incomplete way. The evidence was that in such interviews Mr. Garfield presented a plan by which he said he desired to carry on the investigation in a way which would be deemed more efficient and thorough and of less inconvenience and interruption to the business of the defendants. He said that he wanted to get at the actual facts and in the best way, and for that purpose desired to get access to the books of the defendants and to get their co-operation for the examination thereof in their own offices, which was the plan he proposed. He said that he could not attempt to do the work personally, but would have agents, men duly accredited, officers of the Bureau of Corporations, who were expert in making an investigation of this kind, to do the work; that he could not accept as final any statement made by the defendants from their books, but would require that the agents of the bureau go to the books and verify those statements, or any statements that might be made from the books of original entry themselves, for the reason that he desired, when his report was completed, to be able to say that the agents of the bureau had examined the books of the original entry. And a large number of witnesses for the defendants testified that in the interviews with the Commissioner, as well as with his agents upon the ground, the Commissioner and his agents referred to and asserted the power of the Commissioner, under the law, to compel the disclosures and testimony of the defendants and the production of their books and records.

At the interviews of April 13, 1904, between Mr. Garfield and the defendants, or their representatives, the defendants and representatives of defendants who took part in said interviews stated to Mr. Garfield that they would take up the matter with the defendants and report to him their conclusion. This was done, and the defendants thereupon consulted their respective counsel as to their legal duty and obligation to comply with the call of the Commissioner of Corporations so made for the disclosure as to their business and for the production of their books and records to the Commissioner and his agents, and were advised by their counsel with respect thereto, and acting upon such advice they reported to the Commissioner that they would comply therewith, and in furnishing information and access to their books and records they acted in accordance with that advice. On the 14th or 15th of April, 1904, the Commissioner brought to the offices of the respective defendants at the Union Stockyards in Chicago, Mr. Durand, a special agent of the Bureau of Corporations, and introduced him to certain of the defendants, officers of the defendant corporations, and stated that Mr. Durand would be in charge of the investigation in Chicago with the authority of the Commissioner to represent him. Thereupon, a few days afterwards, Mr. Durand, with the authority of the Commissioner, presented to the officers of Armour & Co., Swift & Co., and the Fairbank Canning Company written memoranda of the information which he desired from the defendants and from their books and records at that time. These memoranda were first presented to officers of Armour & Co. and to officers of Swift & Co., and were taken up, respectively, by the officers of these companies among themselves and with Mr. Durand, and by an officer of Armour & Co. with Mr. Garfield at Washington, upon certain questions as to the scope of the inquiries and as to whether certain specific parts of the information called for was within and pertinent to the investigation; and, these questions being deter-

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mined, special agents of the Bureau of Corporations were given access to the books and records of those companies containing such information, and a few days later, upon [814] presentation of similar memoranda to the officers of the Fairbank Canning Company, the agents of the bureau also commenced the investigation of the books and records of that company and were given like access thereto. A little later Mr. Robertson, a special agent of the bureau, by the direction of the Commissioner, went to Omaha and applied to the defendant officer of the Cudahy Packing Company and called for access to the books and records of that company for similar information, and this call or request was complied with by Mr. Cudahy; and also by like direction and authority said Robertson went to the office of the Armour Packing Company in Kansas City, and made a similar call or request of that company, and this call was complied with, and access to the books and records of that company given by the direction and authority of Mr. Charles W. Armour, president of that company and vice president of Armour & Co. The investigation continued in the offices of the defendants at Chicago until January 28, 1905, and from time to time at intervals afterwards during the spring and early summer of 1905. In the meantime other communications in writing, signed by the Commissioner, for additional information according to memoranda thereof accompanying the letters, were presented to the defendants, and (after the disposition of objections by certain of the defendants to portions of the information) the information was furnished by the defendants so far as required by the Commissioner. This information was of the facts of costs, expenses, selling prices, and proceeds, and other facts and data from which the Commissioner and his experts were enabled to determine the costs, expenses, selling prices, and margin of profits of the respective defendants in the dressed-beef business, and also information as to the organization, conduct, and management of their business, and much information as to the other branches and departments of their business.

The agents of the bureau also investigated the books of divers subsidiary corporations of the National Packing Company, in compliance with the interview and call of the Commissioner of Corporations therefor with and upon the president of that company, Mr. Lyman, on April 13, 1904, and by and with the authority and direction of the board of directors of that company acting under advice of counsel; and the counsel of that company, at the request of the Commissioner addressed to that company, made a statement of information as to the organization of that company. On January 28, 1905, the Commissioner addressed communications to Armour & Co., Swift & Co., and the Fairbank Canning Company (or Morris & Co., the owners of the Fairbank Canning Company), in which he requested further information "which can best be secured in the form of a written statement to be drawn up on the basis of oral interrogatories of an informal character," and stated that Special Examiner Durand was authorized to address to the proper representatives of those companies questions covering the subjects mentioned in the letter, which were: History, ownership, and organization of the National Packing Company; ownership of the securities of the defendant companies whose representatives should be examined; relation of those companies and stockholders to subsidiary corporations and other corporations connected with the packing business or cattle industry; methods of competition in the purchase of cattle and the sale of meat products; control of the large packers over the prices of live stock and of meat products; relation of the prices of cattle and the prices of beef, and the causes affecting them; cost of killing cattle and of handling the products thereof; capital stock, bonds, total sales, earnings, and dividends of

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the companies whose representatives should be examined; names of private car lines controlled by those companies or their stockholders; the number of cars owned or operated, the mileage made and the cost of operation. And the letter of the Commissioner stated that statements in reply to such interrogatories would be taken down by a stenographer and recast in systematic form by Mr. Durand and submitted to the representatives of the defendant companies for revision, signature, and authentication by oath or affirmation; and if it should then be found necessary to supplement the affidavit in any way Mr. Durand would address inquiries to other representatives in the same manner. Upon Mr. Durand taking up this matter separately with representatives of the different companies addressed, Mr. Durand testified that counsel for one of the companies, to whom certain of the questions to that company were referred, declined to answer certain of those questions [815] under oath or to advise his clients so to do; the evidence as to such refusal and as to the extent and scope thereof and the reasons therefor being conflicting. This being reported by Mr. Durand to the Commissioner, Mr. Durand was instructed by the Commissioner to take all such statements without oath, and he did accordingly examine divers of the defendant officers of the companies orally, but without administering or requiring any oath, and took down and transcribed and submitted to them the statement of their answers for revision, and these statements, being revised and approved, were taken and transmitted by him to the Commissioner of Corporations.

On February 28, 1905, the Commissioner of Corporations, having reached the results of his investigation for the purpose of a report thereof as required by the Martin resolution, came to Chicago with Mr. Durand and called upon the defendants to produce their books showing their profit and loss accounts and the results of their business, for the purpose of comparing therewith and checking the computation of the profits and results of their business at which he and his expert statisticians had arrived. This was complied with by the defendants, and the books and records showing the profits of their business and of the different departments thereof were produced to and examined by the Commissioner and Mr. Durand. Thereupon the Commissioner completed and submitted his report of March 3, 1905, entitled "Report of the Commissioner of Corporations on the Beef Industry," which was transmitted by the President to Congress on that day and published, and is referred to in and made a part of the special pleas herein. The report is accompanied by the letter of the Commissioner stating that it is a report made under the direction of the Secretary of Commerce and Labor, "and upon that portion of the resolution of the House of Representatives adopted March 7, 1904, having to do with the prices of cattle and dressed beef, the margins between said prices, and the organization, conduct, and profits of the corporations engaged in the beef packing industry." The evidence showed that the printed report of the Commissioner of Corporations was used by the United States Attorney before the grand jury which found the indictment herein, in examining a witness as to certain of the subsidiary companies of the National Packing Company.

Commissioner Garfield also testified that certain matter containing tables compiled by Special Examiner Durand, under his direction, from information obtained from the books and records of the defendants in the course of such investigation, showing the numbers of cattle, hogs, and sheep from time to time purchased and killed at the various stockyards by the different defendant companies, which made up an additional chapter of his report upon the evidence of a combination between the packers, but which was not included in his

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published report, were on October 17, 1905, by the direction of the President, turned over by him in his office to Mr. Pagin, an assistant to the Attorney General, who came to the office of the Commissioner by appointment through the Attorney General, and at his direction, to be taken by Mr. Pagin to Chicago for use in preparation for the trial of the defendants upon this indictment; and that Mr. Durand was sent by him to Chicago to explain to the United States Attorney at Chicago these tables. The evidence showed that these tables were brought to Chicago by Mr. Pagin and turned over to the United States Attorney; Mr. Pagin leaving Washington on the evening of October 17th. Mr. Garfield testified that compilations from these tables, showing the uniformity in the percentages of purchases of live stock by the different defendant packing companies, and the import thereof as tending to show combination among the packers in the purchases of live stock, was the subject of discussion between him and Mr. Meeker, one of the defendants, at an interview in the office of the Commissioner in December, 1904, at which Mr. Meeker was asked by the Commissioner with respect thereto and answered the same. Commissioner Garfield also testified that he had had conferences with the Solicitor General and Attorney General in the summer of 1904 regarding this investigation and the powers of the bureau, and that the matter of turning over to the Department of Justice the information secured in progress of the investigation was involved in the conference with the Attorney General in September, 1904. Mr. Garfield testified that the special agents of the Bureau of Corporations, engaged in obtaining information from the defendants and in the examination of the books and records of the defend- [816] ants, were also engaged in obtaining information respecting the matters covered by the investigation from outside sources, and made reports to the bureau, and certain of them included in their reports the names of persons who might be witnesses upon the subject-matter of a combination between the packers.

Under date of August 16, 1904, the United States Attorney at Chicago wrote the Attorney General with reference to obtaining testimony in the "Beef Trust Case," and suggested that he ask the Commissioner of Corporations to give the United States Attorney such additional information as he had upon the subject and request his employes then in Chicago to call upon him and furnish such information as they might have. This letter was communicated to the Commissioner of Corporations, and under date of August 22, 1904, the Commissioner transmitted to the acting Attorney General a memorandum of the names of certain persons from whom the United States Attorney "may be able to obtain statements regarding the allegations that the injunction in the Beef Trust Case is being violated." This memorandum contained the names of some 30 persons and firms. Mr. Garfield testified that these names were obtained by his agents from sources outside of the defendants, but that he did not know personally where his agents got the names, but that it was made up from files in his office; and the testimony of a witness on behalf of defendants, an employe of Swift & Co. who furnished information to the agents of the Bureau of Corporations at their request therefor and upon the direction of his employer, was that four of the names upon this list were given by him to Mr. Carroll, one of the special agents of the Bureau of Corporations engaged in such investigation, at the request of Mr. Carroll. Mr. Garfield also testified that in January, 1905, he turned over to the United States Attorney for said district a similar list of names of persons as witnesses who claimed they knew of alleged facts regarding a combination among the defendants, which list was obtained in the same manner from the agents of the Bureau.

Upon the conclusion of the testimony a motion was entered on be-

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half of the defendants that the court direct the jury peremptorily to find the issues for the defendants. A cross-motion was also entered on behalf of the United States that the court direct a verdict for the government.

William H. Moody, Attorney General, and *Charles B. Morrison*, United States Attorney, and Assistant United States Attorneys *Hanchett* and *Godman*.

John S. Miller and *A. R. Urion*, for defendants Armour & Co., Armour Packing Co., J. Ogden Armour, Patrick A. Valentine, Arthur Meeker, Thomas J. Connors, Samuel McRoberts, and Charles W. Armour.

William J. Haynes and *Louis C. Ehle*, for defendants Swift & Co., Louis F. Swift, Edward F. Swift, Charles H. Swift, Lawrence A. Carton, D. Edwin Hartwell, Albert H. Veeder, Robert C. McManus, and Arthur F. Evans.

John C. Cowin, *Brode Davis*, and *Moritz Rosenthal*, for defendants Cudahy Packing Co. and Edward A. Cudahy.

George W. Brown and *M. W. Borders*, for defendants Fairbank Canning Co., Edward Morris, and Ira N. Morris.

HUMPHREY, District Judge (orally).

A number of acts of Congress are involved in the case, and have been discussed upon the arguments on the motion and cross-motion to direct a verdict—the Cullom act, the original interstate commerce act of February 4, 1887 (24 Stat. 379, c. 104), and amendments of March 2, 1889 (25 Stat. 855, c. 382), and February 10, 1891 (26 Stat. 743, c. 128, [U. S. Comp. St. 1901, p. 3154]); the act with regard to testimony of February 11, 1893 (27 Stat. 443, c. 83 [U. S. Comp. 1901, p. 3173]), being supplemental to the Cullom act; the act establishing the Department of [817] Commerce and Labor of 1903 (Act Feb. 14, 1903, c. 552, 32 Stat. 825 [U. S. Comp. St. Supp. 1905, p. 63]), and by its terms adopting certain portions of the two first-named acts; the Sherman act (the anti-trust law of 1890); and Appropriation Act Feb. 25, 1903, c. 755, 32 Stat. 904 [U. S. Comp. St. Supp. 1905, p. 602]. The defendants are indicted under the Sherman act

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(the anti-trust act), charged with a conspiracy in restraint of trade. They have pleaded that as to them that act is suspended and inoperative and does not exist, because they were compelled to furnish evidence of and concerning the matters contained in the indictment, and that under the law such furnishing of evidence gives them immunity. The question of guilt or innocence is not involved.

As to the corporations, the artificial persons named as defendants, the pleas cannot avail. I regard that contention as having been met and overruled by the late decision of the Supreme Court in the case of *Edwin F. Hale v. William Henkel*, United States Marshal, 26 Sup. Ct. 370, 50 L. Ed. —, decided March 12, 1906, and not yet officially reported. In the typewritten decision of that case forwarded to the Attorney General and by him presented to the court I find the following language:

"But it is further insisted that, while the immunity statute may protect individual witnesses, it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the fifth amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a "person" within the meaning of this amendment really does not arise, except, perhaps, where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employes. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself, and, if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman anti-trust act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employes, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the Legislature to declare these combinations unlawful, if the judicial power may close the door of access to every available source of information upon the subject? * * *

"If, whenever an officer or employe of a corporation were summoned before a grand jury as a witness, he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. But, conceding that the witness was an officer of the corporation under investigation and that he was entitled to assert the rights of the corporation with respect

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to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business [818] or to open his doors to an investigation so far as it may tend to criminate him. He owes no such duty to the state, since he receives nothing therefrom beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law and in accordance with the Constitution. Among his rights are a refusal to incriminate himself and the immunity of himself and his property from arrest and seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

"Upon the other hand, the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the Legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

"It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchises from the Legislature of that state; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the general government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in vindication of its own laws are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations."

I regard this as clearly distinguishing between the corporation and the individual who is an officer of the corporation. I cannot understand the opinion in any other way except as

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holding that there can be no immunity for the corporation, but that the officer or agent of the corporation, if the facts bring him within the purview of the law, may plead such immunity. This disposes of the corporations.

Now, as to the individual defendants: There is a provision in the commerce and labor act providing for immunity, and it refers for the immunity to the Cullom act and the act supplemental thereto. The commerce and labor act reads:

"All the requirements, obligations, liabilities, and immunities imposed or conferred by said 'Act to regulate commerce,' and by 'An act in relation to testimony before the Interstate Commerce Commission,' and so forth, approved February eleventh, eighteen hundred and ninety-three, supplemental to said 'Act to regulate commerce,' shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section." Act Feb. 14, 1903, c. 552, § 6, 32 Stat. 827 [U. S. Comp. St. Supp. 1905, p. 68].

[819] The act supplementary to the Cullom act has an immunity clause in the following words:

"But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding." Act Feb. 11, 1893, c. 83, 27 Stat. 443 [U. S. Comp. St. 1901, p. 3173].

Appropriation Act Feb. 25, 1903, c. 755, § 1, 32 Stat. 904 [U. S. Comp. St. Supp. 1905, p. 602], for the enforcement of the Cullom act, the Sherman act, and the Wilson act, exempts from prosecution persons giving testimony in the following language:

"Provided, that no person shall be prosecuted or be subjected to any penalty or forfeiture for, or on account of any transaction, matter or thing concerning which he may testify, or produce evidence documentary or otherwise, in any proceeding, suit or prosecution under said act."

It is necessary to look into the purposes of Congress in passing the commerce and labor act in order that the court may determine what construction will best carry out the legislative intent. It is the duty of the court in construing an act to give it such construction as will carry out the legislative purpose expressed in the act itself. It is clear to my mind that the primary purpose of the commerce and labor act was to enable Congress, by information secured through the work of officers charged with the execution of that law, to pass such remedial legislation as might be found necessary.

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I regard this as the primary purpose, the chief purpose, a legislative purpose. It is clear from the act itself that, if there be a secondary purpose, the primary purpose, the legislative purpose, was vastly more important in the mind of Congress than any other. Congress wanted to know how the laws with regard to corporations were operating, how they were being evaded, how to strengthen them, in case they needed strengthening. In my judgment, the purpose of every one of these laws, the high aim of Congress in passing them, was a determined purpose that the corporation, the creature of the law, should not be allowed to grow beyond the law. The commerce and labor act is the repeated attempt of Congress to bring to its aid such information as would enable Congress to do whatever might be necessary for the control of corporations. Perhaps a secondary purpose was the punishment of offenders. It is perfectly clear to my mind that this was not the main purpose, because there were abundant laws already on the statute books for that, and a great department skilled in the work of punishing offenders. And still I am not able to say but that a secondary purpose of the commerce and labor act might have been the punishment of offenders. And I say this because it is not inconsistent with the act, or with the declared primary purpose, that this should be done so far as the corporation itself is concerned. This is made pretty clear by the late decision in the Hale Case. If the statute is to be so construed as to carry out the legislative purpose, viz., secure information for the use of Congress, how can that best be done?

The statute itself surrounds the Commissioner with no forms, puts no legislative limits upon his methods, gives him unusual latitude as [820] to methods. It does not require public hearings. I am of opinion that the act contemplated that he should proceed by private hearings, because it provides in express terms that the President shall decide how much of his investigation shall become public. If the Commissioner should have public hearings, the President would have no chance to perform that portion of the work which the act assigns to him. I therefore conclude that the legislative mind intended that the Commissioner should proceed

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by private hearings. The powers of the Commissioner of Corporations are defined in section 6 of the act of February 14, 1903 (32 Stat. 827, c. 552 [U. S. Comp. St. Supp. 1905, p. 68]), and are as follows:

"The said Commissioner shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation, joint stock company or corporate combination engaged in commerce among the several States and with foreign nations excepting common carriers subject to 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained or as much thereof as the President may direct shall be made public.

"In order to accomplish the purposes declared in the foregoing part of this section, the said Commissioner shall have and exercise the same power and authority in respect to corporations, joint stock companies and combinations subject to the provisions hereof, as is conferred on the Interstate Commerce Commission in said 'Act to regulate commerce' and the amendments thereto in respect to common carriers so far as the same may be applicable, including the right to subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths. All the requirements, obligations, liabilities, and immunities imposed or conferred by said 'Act to regulate commerce' and by 'An act in relation to testimony before the Interstate Commerce Commission,' and so forth, approved February eleventh, eighteen hundred and ninety-three, supplemental to said 'Act to regulate commerce,' shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section.

"It shall also be the province and duty of said bureau, under the direction of the Secretary of Commerce and Labor, to gather, compile, publish, and supply useful information concerning corporations doing business within the limits of the United States as shall engage in interstate commerce or in commerce between the United States and any foreign country, including corporations engaged in insurance, and to attend to such other duties as may be hereafter provided by law."

It will be observed that this section by reference gives to the Commissioner of Corporations the same powers with respect to other interstate corporations as the Cullom act and its amendments give to the Interstate Commerce Commission over common carriers so far as the same shall be applicable. These additional powers are contained in section 12 of the amended Cullom act (Act Feb. 4, 1887, c. 104. 24 Stat. 383 [U. S. Comp. St. 1901, p. 3162]), and are as follows:

"Sec. 12. (As amended March 2, 1889 [25 Stat. 858, c. 382, § 3]. and February 10, 1891 [26 Stat. 743, c. 128].) That the Commission

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hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right [821] to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the Circuit Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Section 6 of the commerce and labor act also by its terms provides that persons testifying or producing evidence before the Commissioner shall be entitled to the immunities conferred by the act in relation to testimony before the Interstate Commerce Commission, of February 11, 1893, called the "Supplemental Act." This act contains the following provision:

"But no person shall be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he may testify, or produce evidence documentary or otherwise before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding."

All of these immunity acts are relied upon by the individual defendants, and, while expressed in slightly varying lan-

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guage, they all mean the same thing, and each of them is a substitute for the privilege contained in that clause of the fifth amendment to the Constitution, reading:

"Nor shall any person be compelled in any criminal case to be a witness against himself."

This fifth amendment deals with one of the most cherished rights of the American citizen, and has been construed by the courts to mean that the witness shall have the right to remain silent when questioned upon any subject where the answer would tend to incriminate him. Congress by the immunity laws in question, and by each of them, has taken away the privilege contained in the amendment, and it is [822] conceded in argument that this cannot be done without giving to the citizen by way of immunity something as broad and valuable as the privilege thus destroyed. We are not without authority on this question. By a previous act, Congress undertook to take away the constitutional privilege by giving the citizen an equivalent, and the Supreme Court held in the case of *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, that the substitute so given was not an equivalent. Then, at various times, the immunity acts in question were passed by Congress with full knowledge that in furnishing a substitute for this great right of the citizen, it must give something as broad as the privilege taken away. It might be broader, but it could not be narrower.

Now, in my judgment, the immunity law is broader than the privilege given by the fifth amendment, which the act was intended to substitute. The privilege of the amendment permits a refusal to answer. The act wipes out the offense about which the witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence. The act gives immunity for evidence of or concerning the matter covered by the indictment, and the evidence need not be self-incriminating. The privilege must be personally claimed by the witness at the time. The immunity flows to the witness by action of law and without any claim on his part. *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819; *Hale v. Henkel* (recently decided) 26 Sup. Ct. 370, 50 L. Ed. —; *State v. Quarles*, 13 Ark.

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307, quoted in 142 U. S. 567, 12 Sup. Ct. 199 (35 L. Ed. 1110); *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; *Brown v. Walker*, approved in *Lamson v. Boyden*, 160 Ill. 613, 620, 621, 43 N. E. 781; *People v. Butler Street Foundry*, 201 Ill. 236, 248, 66 N. E. 349.

I am further of opinion that the immunity given by the act must be as broad as the liabilities imposed by the act. The act calls upon the citizen to answer any "lawful requirement" of the Commissioner. "Require" means to ask of right and by authority. Webster's Dictionary. *Tenn. Coal Co. v. Waller* (C. C.) 37 Fed. 545, 547. Anything is a requirement by a public officer which brings home to the person called upon that officer is there officially and desires compliance. "Demand" and "require" are synonyms. *Miller v. Davis*, 88 Me. 454, 34 Atl. 265. The citizen may be punished for refusal to answer such lawful requirement. I am of opinion that when the Commissioner of Corporations, who has power to compel, makes his demand, it is the duty of the witness to obey.

The contention has been made that in order to get immunity the citizen shall wait until the compulsion becomes irresistible. That is the effect of the government contention. I am not able to bring my mind to accept that doctrine. If I am right in saying that immunity flows from the law, without any claim on the part of the defendant—and at different times that has been conceded here in argument—then no act of any kind on his part which amounts to a claim of immunity, which amounts to setting up a claim of immunity, is demanded by the law. The law never puts a premium on contumacy. A person does not become a favored citizen by resistance to a lawful [823] requirement. On the contrary, the policy of the law favors the willing giving of evidence whenever an officer entitled to make a demand makes it upon a citizen who has no right to refuse. And it would be absurd and un-American to favor the citizen who resists and places obstacles in the way of the government as against the citizen who, with a full knowledge of the law, obeys without resistance the demand of an officer who has the legal right to make the demand for something which the citizen has no legal right to refuse. This, then, is the proposi-

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tion to which we are led: When an officer, who has a legal right to make a demand, makes such demand upon a citizen, who has no legal right to refuse, and that citizen answers under such conditions, he answers under compulsion of the law.

Is that the situation here? Was there compulsion in this case, or were the defendants volunteers? There is so little dispute here about the facts that perhaps it is not necessary to discuss them at all. I am of opinion that the conference between Mr. Garfield, Mr. Krauthoff, Mr. McRoberts, and Mr. Dawes is the important matter, the important event, which fixes the character of condition under which this evidence was given. There is some little dispute. It may be said that Mr. Garfield is an interested witness, as a representative of the government. It may be said that Mr. McRoberts and Mr. Krauthoff, they being at the time in the employ of the Armour Company, and one of them being now a defendant, are interested witnesses. But there is little, if any, dispute, perhaps only on one subject, between Garfield and Dawes, only as to the oath, as to the fact that the oath was discussed. They agree in substance on every other proposition. Garfield says there was no discussion of the oath. Mr. Dawes agrees with Krauthoff and McRoberts that there was. I am not able to look at the evidence which was furnished in this case as being the voluntary production of these defendants. The character of such parts of it as I deemed the most important is such that it absolutely dispels any thought of that kind from my mind. Reasoning naturally, reasoning upon the natural course which men in like condition would have taken, I am led to the conclusion that the defendants would have withheld that information if they could.

It is contended that they were volunteers because they higgled with Garfield at times, debated, resisted, gave less than he first asked, withheld some. The record does show this, but the fact remains that every approach was made by the government. In no instance did the defendants go to Garfield offering anything. Garfield made his demands, made them explicit, made them definite, and it does not to my mind destroy the character of compulsion under

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which they acted that the defendants, after having considered the law, and after having made up their minds that they had no legal right to resist, still debated with the Commissioner in the hope of inducing him to minimize his demands and take something less than he had originally demanded. This in some instances was done. Garfield came to them. They did not go to him. He demanded in writing, and through his accredited representatives; and I would not regard it as proper to hold him for any actions of his representatives, the result of which did not flow straight [824] to him, through them, from the defendants. But, so far as such results did flow straight to him in answer to his demands, they were negotiations between him and the defendants on his legal demands, which they had no right to dispute, or refuse to answer. He came to the defendants and presented them with the law. He held up before them his power as Commissioner. The defendants knew the law. They had been fully advised. They took further time after his first interview, and were advised further. They saw that the Martin resolution, under the eighth section of the law, made Garfield's duty imperative. After the passage of that resolution the defendants saw that Garfield was compelled to act, compelled to demand, and they were compelled to answer.

I regard Garfield as having been under the strictest legal compulsion by the terms of the Martin resolution. It may be said that he could have gone somewhere else and got his information. The record shows that he himself said that he could not; that he could not make the investigation imposed upon him as a legal duty by the Martin resolution and the eighth section of the law without getting it from these people. And the investigation itself disclosed that they are the authors of nearly one-half of all the business in their line in the whole country. So that I think he was compelled to demand from them, as well as they were compelled to answer, under this statute and resolution. Now, if the defendants volunteered nothing, but gave only what was demanded by an officer who had the right to make the demand, and gave it in good faith under a sense of legal

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compulsion, I am of opinion that they are entitled to immunity under the act.

But it is insisted by the government that they did not give under compulsion, because they did not give under what is known in the law as testimonial compulsion; and it is argued that testimonial compulsion means compulsion furnished by the subpoena and oath. I can add nothing to what has been adduced by way of argument here on those subjects. The subpoena is not necessary where the person is present in court or within the verge of the court. *Goodpaster v. Voris*, 8 Iowa (8 Clarke) 334, 74 Am. Dec. 313; *Leckie v. Scott*, 10 La. 412. So the rule is the same as to the production of documents. *Hunton v. H. & H. Co.* (Mich.) 76 N. W. 1041; *Starr v. Mayer*, 60 Ga. 546. The only object of the subpoena is to secure the attendance. It is superfluous when he is present without subpoena. *U. S. v. Sanborn* (C. C.) 28 Fed. 299, at page 302, per Mr. Justice Gray; *Eastman v. Sherry* (C. C.) 37 Fed. 844, 845, per Jenkins, J.; *Farmer v. Storer*, 11 Pick. (Mass.) 241. "Lex neminem cogit ad vana seu inutilia." *Land Co. v. Peck*, 112 Ill. 408, 439. Under the judiciary act, providing for allowance "to the witnesses summoned in any court of the United States," it was held that the fees of a witness who attended at the request of the United States attorney without having been summoned, were taxable. *U. S. v. Williams*, 1 Cranch, C. C. 178, Fed. Cas. No. 16709; *Prouty v. Draper*, 2 Story, 199, Fed. Cas. No. 11447; *Whipple v. Cumberland Cotton Mfg. Co.*, 3 Story, 84, Fed. Cas. No. 17515; *Hathaway v. Roach*, 2 Woodb. & M. 63, 73, Fed. Cas. No. 6213, approved by Gray, Circuit Justice, in *U. S. v. Sanborn* (C. C.) 28 Fed. 301. So a witness who attends without subpoena attends "pursu-[825] ant to law." *U. S. v. Sanborn* (C. C.) 28 Fed. 299, 302; *Hanchett v. Humphrey* (C. C.) 93 Fed. 895-897; *U. S. v. Bell* (C. C.) 81 Fed. 830; *St. Matthews Bank v. Fidelity Co.* (C. C.) 105 Fed. 161. I am clearly of opinion that the best judgment to be had from all of the authorities is that the subpoena is a useless and superfluous thing after the tribunal and the witnesses are together. And I am also of opinion that under any of these acts in question, these immunity laws, the production of books and papers would be legal evidence without the oath of any person, when they

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are adduced as showing admissions against interest and against the party producing them.

Upon the authority in the cases of *Bram v. U. S.*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, and *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, legal compulsion does not depend upon subpœna or oath, and upon reason this must be so. Books and documents prove themselves, when produced for the purpose of showing admissions against interest. They are receivable as evidence in all courts against the party producing them. The oath is not always essential to testimony. *Osborne v. Detroit* (C. C.) 32 Fed. 36. No oath is essential to the compulsion to produce documents in a witness' possession. A person who is required to produce documents in his possession, and produces them, need not be sworn in order to get from him the documents. *Perry v. Gibson*, 1 Ad. & Ell. 48; *Id.*, 3 Nev. & M. 462 (K. C. B.); *Davis v. Dale*, 1 M. & M. 514; *Simpson v. Smith*, 1 Starkie on Ev. 161, note (n); *Summers v. Mosely*, 2 Crompt. & Mees. 477; Wigmore, § 1894, note 1. Further, the oath may be waived, and is waived by failing to insist on it or raise the objection. *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046; *Goldsmith v. State*, 32 Tex. Cr. R. 112, 22 S. W. 405; *Birch v. Somerville*, 2 Ir. Law R. N. S. 243; *Richards v. Hugh*, 51 L. J. Q. B. 361; *Cady v. Norton*, 14 Pick. (Mass) 236; *Slauter v. Whitelock*, 12 Ind. 338; *State v. Hope*, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608; *State v. Smith* (Iowa) 100 N. W. 40, 42. Books and papers produced by these defendants as the books and records of their business, and called for as such, are evidence against them, without any oath. If I am right in the proposition that the immunities given by the act are as broad as the liabilities imposed by the act, then the subpœna and the oath were not essential. Garfield could make a legal requirement without using either the subpœna or the oath. I think this is clear from the language of the act. If the Commissioner could make a legal demand without a subpœna, then immunity would follow to the witness answering without a subpœna. It is true that section 6 of the commerce and labor act of February 14, 1903 (32 Stat. 827, c. 552 [U. S. Comp. St. Supp. 1905, p. 68]) says that immunity

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shall apply to all persons "who may be subpoenaed," etc. Now it would be absurd to say that a person subpoenaed would have immunity if he produced no evidence, and, as the subpoena alone cannot give immunity, so the lack of that alone cannot take it away.

The same argument will apply to the oath. The purpose of the oath was to secure the truth. That is always the purpose of the oath. That is the only purpose of the oath; and, to be certain that we get the truth, the court always starts out by putting the witness under oath. But the act under which Garfield was clothed with power did not re-[826] quire him to put anybody under oath. It required him to make investigation. He might make it according to legal forms or not. He might use any kind of evidence that he chose that was suitable to his purpose. The evidence procured from these defendants, so far as it consisted of books and papers, was, however, legal evidence—would be considered legal evidence in a court of law; and under any one of these acts the production of the books and papers is a complete compliance with the law providing for the production of evidence, documentary or otherwise. It is not strange that Garfield was satisfied not to swear the defendants, although he started out with that intention. He distinctly told them so, and his forms show that fact. He expected to put them on oath if he regarded it as necessary, if he had any doubt about the truthfulness of the evidence. He had access to the books of original entry. He was satisfied of that fact. His agents were satisfied of that fact. The record shows this over and over again by repeated answers, and there was not the slightest reason for putting anybody under oath, so far as the use of those books and documents was concerned. The oath of any one would have made that evidence no stronger or better than it is now without the oath.

If it shall be said that the act of February 14, 1903, establishing the Department of Commerce and Labor, allows immunity to the witness only upon the conditions urged by the government, viz., that he shall have resisted until regularly subpoenaed and sworn, no such contention can fairly be made as to the immunity clause of the act of February

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25, 1903. The record shows, and it is not disputed, that material evidence was procured by Garfield from the defendants upon the subject of an unlawful combination. I have already held that it was given under legal compulsion. The record further shows that this evidence was demanded by the Department of Justice for the purposes of this prosecution, and that Garfield declined to give it, as he had promised the defendants it would not be so used; that later, upon repeated demands of the Department of Justice, and upon the order of the President, he turned it over to that department. It is contended that as to all such evidence the defendants are entitled to immunity under the independent and unconditional act of February 25, 1903, and I am of opinion that they are so entitled.

It is contended on behalf of the government that the construction here given to the commerce and labor law would result in the failure to convict individuals for the prosecution of whom the Commissioner of Corporations might be assisting, and thus the law would be nullified; that guilty persons would rush to the officer with their evidence and receive immunity. The answer to this contention is that the primary purpose of the act is to correct defective legislation, and, if an additional purpose be the prosecution of offenders, such additional purpose is clearly secondary. To effect the primary purpose, viz., secure information for the use of the legislative body, the construction here given would be highly efficient, as the persons required to give evidence, being personally immune, would probably testify willingly, while those coming unbidden would be volunteers and not entitled to immunity. I am also presented with the argument that the questions are of great public interest. Therefore the defendants should be held [827] to trial, to the end that upon a final judgment, if adverse to the defendants, the questions arising on the pleas might be reviewed by the Supreme Court, which would not be possible if the decision be adverse to the government. I know that courts have sometimes yielded to this argument in cases of public importance, usually where property rights only were involved; but I think it should not be the controlling motive for the decision here. The parties are entitled to the best

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judgment of the court upon the questions involved. I am of opinion that the record shows the individual defendants to have given under legal compulsion evidence of and concerning the matters contained in the indictment, and that they are therefore entitled to immunity.

Gentlemen of the jury, under the law of this case, the immunity pleas filed by the defendants will be sustained as to the individual defendants, the natural persons, and denied as to the corporations, the artificial persons, and your verdict will be in favor of the defendants as to the individuals and in favor of the government as to the corporations

[1010] LODER v. JAYNE ET AL.^a

(Circuit Court, E. D. Pennsylvania. January 22, 1906.)

[142 Fed., 1010.]

MONOPOLIES—CONSPIRACY—RESTRAINT OF TRADE—BURDEN OF PROOF.—

The burden of proving a combination and conspiracy between manufacturers and wholesale and retail dealers of proprietary medicines and drugs in restraint of trade, in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], injurious to plaintiff, and that defendants were engaged and took part in such conspiracy, was on the plaintiff.^b

SAME—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—FIXING

PRICES.—Where three voluntary associations, composed of the manufacturers, wholesalers, and retailers, respectively, of drugs, proprietary medicines, etc., were organized to arbitrarily fix a minimum retail price for such articles, which were of universal consumption and were of absolute and daily necessity, and then restricted the sale of such articles to such retailers only as conducted their retail business in accordance with the arbitrary standard of prices, such combination was in restraint of interstate commerce in the drug trade in so far as it excluded "aggressive cutters" of prices and those who dealt with them, and was in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], prohibiting monopolies in restraint of interstate trade and commerce, etc.

^a Judgment reversed and a new trial awarded by the Circuit Court of Appeals, Third Circuit, December 3, 1906. The opinion of the court not yet reported in the Federal Reporter. The decision of the Circuit Court, herein reprinted, was, in the main, held to be correct. The error arising from the attempt of the court, by a resolution of the verdict to eliminate items of damage, with regard to which there was admittedly no sufficient evidence.

^b Syllabus copyrighted, 1906, by the West Publishing Co.

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TRIAL—ADMISSION OF EVIDENCE—ORDER OF PROOF.—In an action to recover damages for an alleged conspiracy in restraint of interstate commerce, it was within the discretion of the trial court [1011] to admit evidence of acts and declarations of various of the defendant associations, their officers, committees, members, and agents, made in the absence of many of the other defendants, before a prima facie case of conspiracy had been established, and before privity of some of the defendants had been proven, on condition that such connecting evidence should be thereafter given.

MONOPOLIES—EVIDENCE—FINDINGS.—In an action for damages arising on an alleged conspiracy in restraint of interstate commerce, in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], evidence *held* sufficient to establish the participation of certain of the defendants in such conspiracy.

SAME—COMBINATIONS IN RESTRAINT OF TRADE—DAMAGES—BURDEN OF PROOF.—In an action for damages for conspiracy in restraint of interstate commerce, in violation of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], the burden was on plaintiff to show some real actual damage to his business by reason of the alleged unlawful combination.

SAME—DAMAGES—EVIDENCE.—Where, in an action for damages to plaintiff's business because of an alleged conspiracy in restraint of interstate commerce, plaintiff claimed \$5,000 compensation to himself for extra work claimed to have been required by reason of such unlawful combination, but failed to prove how much additional time he was required to spend in his business after the combination went into effect, he was not entitled to recover for such alleged extra services.

SAME—ADDITIONAL CAPITAL.—Where, in a suit for damages to plaintiff's business because of an alleged unlawful combination in restraint of interstate commerce, plaintiff claimed that because of such combination it was necessary to put \$10,000 extra capital into his business from rents of his building, which were collected from time to time, but he testified on cross-examination that the payments of interest and taxes on the building were in excess of the amount paid into the business, he was not entitled to recover interest on such alleged additional capital.

SAME—INCREASED COST.—Where, by reason of an unlawful combination in restraint of interstate commerce in violation of the Sherman act, plaintiff was compelled to conduct his business at a greater cost, though it was greater in volume, and by reason of the injury he received a less percentage of return, he was entitled to recover such additional cost, though by reason of his increased efforts and the natural increase of his business he was enabled to withdraw from the business for his personal services an amount equal to, or larger than, he drew from the business before the conspiracy became operative.

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At Law. On motion for a new trial.

W. Wilson Carlile and Henry J. Scott, for plaintiff.

Morgan & Lewis, O. E. Shannon, H. C. Haines, F. M. Cody, Hopper, Lessig & Smith, W. H. Hepburn, Charles Biddle, Frank Savidge, Henry D. Paxson, J. C. Jones, Henry La Barre Jayne, Irving P. Wanger, N. Dubois Miller, Joseph C. Fraley, and John G. Johnson, for defendants.

HOLLAND, District Judge.

The plaintiff, C. G. A. Loder, brought suit against the above-named defendants, in this district, to recover damages to his retail drug business, which he claims to have suffered by reason of an agreement, contract, combination, and conspiracy into [1012] which the defendants entered and carried into effect, in connection with other parties throughout the United States, in restraint of interstate trade and commerce, contrary to the provisions of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], entitled "An act to protect trade and commerce against unlawful restraints and monopolies." The provisions of this act of importance in this case are the following:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade, or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides, or is found, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Under sections 1 and 2 of this act every contract, combination, or conspiracy in restraint of trade or commerce among

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the several states, or with foreign nations, and every combination or conspiracy to monopolize any part of the trade or commerce among the several states, or with foreign nations, is declared to be illegal, and every person who makes such a contract, or engages in such combination or conspiracy, or combines or conspires to thus monopolize, is declared to be engaged in an unlawful act; and the seventh section authorizes every person injured in his business or property to bring suit against such other person or corporation, who may be engaged in any such unlawful act, in the Circuit Court of the United States in the district in which the defendants reside or are found.

The plaintiff, claiming that all these defendants were engaged in such a combination and conspiracy to monopolize and to restrain trade, forbidden by these sections, brought suit under the act, and filed his statement of claim. The case was put at issue, and tried at the October term, 1905, and a verdict rendered in favor of the plaintiff against all the defendants, excepting Jayne & Son and Campion & Co., for the sum of \$20,738. Motions and reasons for a new trial were filed on behalf of all the defendants, excepting the two above mentioned, and, in addition, there were filed motions for judgments non obstante veredicto upon the whole record in favor of H. K. Mulford Company, Hance Bros. & White, and Warren H. Poley. In addition to the request for binding instructions at the trial in favor of all the defendants, H. K. Mulford Company, Hance Bros. & White, and Warren H. Poley, by their attorneys, requested binding instructions in favor of [1013] these particular defendants, which request was refused by the court, and under the provisions of the act of the General Assembly of the commonwealth of Pennsylvania, approved the 22d day of April, 1905 (P. L. 286), they are authorized to make this motion for judgment non obstante veredicto upon the whole record, in their favor.

There are in all 33 reasons for a new trial, which can be considered under three different heads: First, those which raise the questions as to whether or not the plaintiff charged and proved a violation of the Sherman act, and as to the cor-

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rectness of the charge and rulings of the court in this connection; second, the admissibility of certain evidence; third, the sufficiency of the proof of the different items of damage claimed.

In his statement of claim Loder alleges, and offered evidence to prove, that for more than 20 years he has been engaged in the business of dealing in drugs at wholesale and retail in the city of Philadelphia, buying and selling his merchandise in various cities of the union without any hindrance to him by any one until November 1, 1900, when the injury to his business complained of began, and this he says was brought about by the defendants and others acting together in a combination and conspiracy, which he lays in his statement of claim in language following:

"The Proprietary Association of America, the National Wholesale Druggists' Association and the National Association of Retail Druggists, their officers, delegates and members unlawfully entered into an agreement, combination and conspiracy in restraint of trade or commerce among the several states and with foreign countries in this, to wit: that they unlawfully agreed, contracted, combined and conspired to enhance and arbitrarily to fix, regulate and determine the wholesale and retail prices at which various commodities of the drug trade consisting of patent medicines, drugs and proprietary articles manufactured in the several states should be sold to the retail druggists and by the said retail druggists to the consumers, residents of the several states of the United States."

The Proprietary Association of America is an unincorporated association composed of over 90 per cent. of all the manufacturers and proprietors of patent medicines within the United States; the National Wholesale Druggists' Association is an unincorporated association composed approximately of 95 per cent. of all the wholesale druggists of America who are engaged in the business of selling at wholesale drugs and proprietary articles to retailers for the manufacturers and proprietors of these drugs throughout the United States, and all the defendant wholesalers are members of this association; and the National Association of Retail Druggists is also an unincorporated association, with headquarters at Chicago, and has a membership composed of the local association of druggists, the members of these local associations comprising about 90 per cent. of the retail druggists in the cities, towns, and counties, or districts throughout the United States in which local organizations are formed, and these local associa-

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tions are represented in the National Association by delegates periodically chosen for that purpose. There is also an incorporated association, one of the defendants, the Philadelphia Association of Retail Druggists, composed of nearly all the retail druggists in the city of Philadelphia, and with which association all the defendants named [1014] in this suit who are engaged in the retail drug trade are connected either as members or officers. This local association is a member of the National Association of Retail Druggists, and these defendants, who are members, have been acting in accordance with the rules and regulations of the National Association in the conduct of their business as retailers.

The burden of proving the existence of this agreement, contract, combination, and conspiracy, and that the defendants were engaged and took part in it, was upon the plaintiff, and for that purpose evidence, which was uncontradicted, was offered to prove that the National Association of Retail Druggists had its central office in Chicago, and received financial support from all the other associations and many of the members belonging to them; that from this central point organizers were sent out for the purpose of bringing the local retail dealers into associations, and, as a result, Philadelphia retailers were organized into an incorporated association known as the Philadelphia Association of Retail Druggists. In accordance with the plans suggested by the organizers sent from Chicago, the Philadelphia retail druggists working with the organizers secured a consensus of opinion of the retailers here from which they fixed the minimum rate at which drugs should be sold at retail by the retail druggists in Philadelphia and vicinity. All the retail dealers were then notified of this minimum rate, and in case the retailer cut below the price so fixed his name, with this information, was sent to the National Association of Retail Druggists at Chicago, and the secretary, Mr. Wooten, then placed the name of this retail druggist upon what was known as an "aggressive cutter's" list, and this aggressive cutter's list, with his name thereon, was sent to all proprietors, members of the Proprietary Association of America, and all the wholesalers, members of the National Wholesale Druggists' Association, with the request that they cease selling any drugs

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whatever to such aggressive cutter; and it was further established, in case any proprietor or wholesaler, after receiving this notice from the secretary of the National Association of Retail Druggists, failed to obey and cease selling to such aggressive cutter, this information of his failure to obey also found its way to the secretary of the National Association of Retail Druggists, and such disobedient proprietor or wholesaler was disciplined by being put upon what was designated as a "pink slip," and his name was sent to all retailers throughout the United States with the information that he had been selling to aggressive cutters, and the request made to the retailers throughout the country to cease making any further purchases from such delinquent wholesaler or proprietor.

It is very plain that this arbitrary fixing of a minimum retail price for drugs which are of universal consumption and of absolute and daily necessity and then restricting their sale to such retailers only who conduct their retail business in accordance with this arbitrary standard of prices is a clear restraint of interstate commerce in the drug trade to the extent of excluding the aggressive cutters and those who deal with them, and is in violation of the act. The plaintiff was reported to Secretary Wooten, and on November 1, 1900, his name was placed upon an aggressive cutter's list, from which date down [1015] until the 28th day of July, when suit was brought in this case, he was unable to buy drugs direct from the proprietors or wholesalers in the United States, but was compelled to purchase them in the name of other persons and in various indirect ways, and even then was unable to keep his store stocked as extensively as a retailer usually requires. Thus embarrassed, he was compelled to secure these drugs at a much greater cost than he would have paid had he been able to purchase in the regular way.

The evidence shows that all the defendants against whom the verdict was rendered were connected with one or the other of these associations; were cognizant of the method adopted to coerce the retailers to adopt the minimum rate, and participated in the scheme of punishment visited upon all who cut below the price fixed. Of course, there was no documentary evidence which the plaintiff could produce to

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show this alleged conspiracy, except copies of the kind of "aggressive cutter's" lists and "pink slips" sent out by Mr. Wooten, or, that one of the objects of these associations, and the members thereunto belonging acting together, was for this alleged purpose, but the court permitted him to show the close association of all these organizations engaged in the drug business, their acts and declarations appearing in their printed records of their joint and separate meetings, the publications and declarations made in their official organ in support of their rules and regulations jointly and separately enacted for the purpose of effecting the object of this association. It nowhere expressly appeared that one of the objects was to combine for the purpose alleged in the plaintiff's statement and to carry it out by the drastic, disciplinary methods proven at the trial. On the other hand, the evidence showed that their reports, speeches, declarations, and resolutions were usually couched in language which, upon its face, was not inconsistent with a lawful purpose, but taken in connection with what afterward occurred, and the implicit obedience with which the members, and particularly the defendants in this case, obeyed the command of the secretary of the National Association of Retail Druggists, it was for the jury to say whether or not the evidence as a whole did not justify the finding that an agreement, contract, combination, and conspiracy such as charged existed, and whether the defendants were engaged in it. The jury were instructed that if the combination and conspiracy set forth in the statement existed, it was in violation of the Sherman act, and it was for them to say whether or not the plaintiff had proven his case. The jury found in his favor.

These instructions, upon a review, we are convinced were properly given, and that the findings of the jury were based upon competent evidence. Many acts and declarations of the various associations, their officers, committees, members, and agents made in the absence of many of the other defendants in the case for the purpose of proving the conspiracy were admitted before a *prima facie* case of conspiracy had been established and before the privity of some of the defendants had been proven. It is true that the rule

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in the admission of evidence in conspiracy cases is to require first the proof of a *prima facie* case of conspiracy before the acts and declarations of co-conspirators made in the absence of defendants are admitted against them, although the [1016] court may, in its discretion, permit evidence of the declarations to be introduced out of its order, upon condition that it be afterwards followed by evidence of the conspiracy, and in some peculiar instances, in which it would be difficult to establish defendant's privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. Substantially the same rule applies in criminal as in civil cases as to the admissibility of the acts or declarations of one conspirator as original evidence against each member of the conspiracy. Elliott on Evidence, vol. 4, § 2939; *Id.* vol. 1, § 249; Rice on Evidence, vol. 3, p. 904, § 578d. All the evidence sought to be stricken out by the motion of defendants, which raised the question of the competency of this evidence, was of this character and clearly admissible. On the whole evidence, the combination and the privity of defendants were established by proof of facts personal to each connecting him therewith. The question of damage will be considered after disposing of the motions for judgments *non obstante veredicto*.

It is contended that upon the whole record notwithstanding the verdict judgment should now be entered by the court in favor of Hance Bros. & White, H. K. Mulford Company, and Warren H. Poley. As we have already concluded that the combination and conspiracy alleged in the statement of claim, if proven, was in violation of the act of Congress, and the verdict of the jury in favor of the plaintiff having established its existence, the only question to be determined as to these three defendants is whether or not there is any evidence to show that they or either of them were engaged in it. Hance Bros. & White and H. K. Mulford Company were members of the National Wholesale Druggists' Association, and Warren H. Poley was a member of the Philadelphia Association of Retail Druggists.

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It is not attempted to hold any of these defendants through the associations with which they are affiliated. The suit as to them is directly against the firm of Hance Bros. & White, the corporation of H. K. Mulford Company, and Warren H. Poley individually. The combination and conspiracy in which it is alleged they were engaged and which caused the injury to the plaintiff was for the purpose of arbitrarily fixing, regulating, and determining the wholesale and retail prices at which drugs should be sold to retail druggists, and by them to the consumers throughout the United States, and to carry into effect this combination or conspiracy, it is claimed that these defendants, with others in the suit, took part in the proceedings of the various organizations with which they were affiliated in bringing about and formulating rules and regulations by which delinquents could be placed upon the aggressive cutter's list, and pressure brought to bear upon them for the purpose of compelling them to conform to the demands of those engaged in the combination and conspiracy. Each of these defendants who took part in the meetings which brought about this central organization at Chicago, with power to carry into effect these disciplinary measures, acted upon the commands of the secretary of the National [1017] Association of Retail Druggists with regard to the punishment administered to those who were blacklisted.

The evidence shows that these three defendants were fully aware of the methods pursued by the associations to which they belonged by which their members strengthened and perfected the system of coercion emanating from Chicago, and that they, to a more or less extent, participated and acquiesced in the preliminary arrangements leading up to the consummation of the plan. The Philadelphia Association of Retail Druggists, of which Mr. Poley is a member, is a corporation, and made a defendant in this case, yet whatever part he took as an individual in the preliminary and final steps taken to carry into effect the combination and conspiracy as charged, he must answer for in his individual capacity. What part, if any, did these defendants take? The Philadelphia Association of Retail Druggists, on January 31, 1901, sent out from the office of the executive com-

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mittee, No. 4154 Lancaster avenue, Philadelphia, a letter marked personal and confidential, as follows:

"Being satisfied that the policy of your firm is one of fair and considerate dealing with the retail drug trade and that you are willing to co-operate with the retail druggists along lines of mutual profit, we take the liberty of inviting your attention to the present unprofitable condition of the retail drug business in this city and of asking your co-operation with our efforts to better matters.

"The situation is this: The retail druggists of Phila. have agreed upon a schedule of prices for proprietary articles about 10 to 20% above those now generally received, the only one positively refusing to be controlled by this scale being Mr. C. G. Loder. In justice to those druggists located near Loder's store, we have deferred putting this schedule into effect until all could be protected by a common selling price, and Mr. Loder alone by his refusal, is obstructing this movement and is now preventing the druggists of this city from obtaining between prices for proprietary goods.

"We do not wish to coerce Mr. Loder or to force him into difficulties, but it does seem unfair that one man alone should deprive all the other druggists of Phila. of the fruit of many months' labor. We are willing to make reasonable terms with Loder, and have so offered, but his intention evidently is to block our plans that he may profit thereby and he refuses to agree with us.

"Under these circumstances, we think that we have the right, the right of self-protection, to ask you not to sell Mr. Loder any of your goods and proprietary articles until he agrees with us. We believe that when Mr. Loder finds that he is not greater than all the rest of Phila. druggists together nor entitled to more favor that he will listen to reason and be willing to co-operate with us along lines of mutual profits. We wish to bring him to this belief, and one of the means we are trying to use is to show him that dealers and manufacturers will not supply him with goods when by so doing they will be injuring the business of every other retail druggist in this city. We do not ask any one to refuse him goods for any other reason than this; that the interests and welfare of all are greater than those of one alone!

"We therefore invite your careful consideration of this question, and we further ask in reply a statement from you of the position you may decide to take; for, by your action, you can either greatly help or materially retard the progress the retail druggists here have made towards the better realization of better trade conditions.

"Yours very truly.

"The Executive Committee, Phila. Association of Retail Drugg."

To which Hance Bros. & White replied:

"The policy of our house is not to sell to department stores. If the party you mention sells our goods, he does not get them from us as we don't sell him."

[1018] Subsequently, in June, 1903, a resolution C, which had been adopted by the wholesalers, as follows:

"Resolved, That in accordance with the recommendation of President Sealey, the Secretary is instructed to request all manufacturers of chemicals, pharmaceuticals, plaster, dressings and like products handled by the drug trade, to desist from selling aggressive cutters

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or supplies of cutters when solicited to do so by the respective local associations, and that the retail druggists shall be made acquainted with the response in such manner as the executive committee may deem best."

—was sent out to the drug trade in connection with the following query:

"Will you, when specially requested by the officers of the local association of retail druggists throughout the country that are affiliated with the N. A. R. D., refuse all sales to these price demoralizers whom the various manufacturers of proprietaries have designated as aggressive cutters?"

To which Hance Bros. & White, on June 24, 1903, responded as follows: "Our answer to the National Secretary's question is 'Yes.'" The receipt of this circular letter, the response to the inquiry accompanying resolution C, together with other statements made by Anthony M. Hance as to the connection of his firm with the alleged combination and conspiracy, show that they are equally responsible with the other defendants in the case.

From the testimony of H. K. Mulford, the vice president of the H. K. Mulford Company, we find that his company is an associate member of the National Wholesale Druggists' Association. It was shown that this, with the other associations, at various times acted together through committees appointed for that purpose, and worked in entire harmony with each other, and that he received information from the very headquarters of the combination, to wit, the secretary of the National Association of Retail Druggists at Chicago, and his company acted in strict compliance with the demands of the alleged wrongdoers for the reason that Loder was demoralizing business conditions and appeared upon the aggressive cutter's list. Mr. Mulford admitted that he received the information as to Loder cutting prices through the secretary of the National Association of Retail Druggists, and declared that his company would refuse to sell any wholesaler who was supplying Loder with goods, if his name appeared upon the aggressive cutter's list. The company's connection with the wholesalers' association, and its action in connection with the disciplinary rules administered to delinquents, was evidence to be submitted to the jury as to whether or not it was, through its officers, one of the parties

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engaged in the alleged combination and conspiracy. It is not denied but that the Mulford Company, or any other defendant, would be privileged to buy from or sell to, or refuse to buy from or sell to, any other person for any reason that might suggest itself without being responsible in damages under the Sherman act, but if the defendant acted upon a policy in accord with those shown to be in a combination and conspiracy not to sell to aggressive cutters, and received its information from them, and acted upon it, and, at the same time, was an associate member of one of the associations, there is sufficient evidence to submit to the jury to say whether it was part of the combination, or acted independently, as claimed. The jury found against the company, and in this I think they were right.

[1019] Mr. Poley was an active member of the Philadelphia Association of Retail Druggists, and took part in its proceedings at a meeting where a resolution was offered "advising the National Association of Retail Druggists to exhaust every means before taking final action disciplining the firm of Smith, Kline & French Company." It is very evident he knew the nature of these disciplinary measures, as it appeared in the evidence that the Smith, Kline & French Company were subsequently blacklisted and punished for disobedience, and a "pink slip" sent out against it. Mr. Poley, prior to that time and some time before the latter part of the year 1903, offered a resolution, which was passed at a meeting of the local association, as follows:

"That our delegates to the Convention of the N. A. R. D. be instructed to use utmost endeavors to have resolutions passed at the coming convention that the druggists of America refuse to handle any new proprietaries unless protected in price."

The gist of this resolution was enacted at the Boston convention of wholesalers, and the punishment inflicted upon any one who demoralized these prices is through the very association to which his resolution appealed. Surely he cannot now be heard to say that he took no part in bringing about the creation of this system of coercion to sustain prices. The motions for judgments non obstante veredicto in favor of these three defendants, for the reasons stated, are overruled.

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The plaintiff's claim for damages submitted to the jury was made up of the following items:

| | |
|--|-------------|
| Compensation to the plaintiff for extra time and labor covering a period of four years----- | \$20,000.00 |
| Eight per cent. increased cost on \$96,000 of proprietaries purchased during period from November 1, 1900, to July 25, 1904----- | 7,680.00 |
| Extra clerk hire \$1,000 per year----- | 4,000.00 |
| Interest on \$10,000, extra capital, for 4½ years----- | 2,700.00 |
| Loss of profits on sales lost from June 3, 1904, to July 25, 1904----- | 36.72 |

Making a total of ----- \$34,416.72

The jury rendered a verdict for \$20,738, and the defendants contend that even if it be conceded that a combination and conspiracy prohibited by the act had been established, there was not sufficient evidence from which the jury could find damages to the extent of the verdict rendered, and it is specifically urged that there was no competent evidence submitted upon which the jury could find in favor of the plaintiff for any part of the claim for extra labor of \$20,000, increased cost on proprietaries \$7,680, or interest on extra capital of \$2,700, and, further, that, even if the plaintiff had proven the necessity for an extra clerk, his salary was only \$18 a week, and the claim could only be made for 3½ years. The burden of proof was upon the plaintiff to show some real and actual damage to his business by reason of this unlawful combination, and it is equally well settled that unless they prove this damage by a preponderance of competent evidence, the verdict must be for the defendant. The items of damage claimed must be established by proof of facts from which they may be rationally inferred with reasonable certainty by the jury. *Coal & Coke Co. v. Hartman*, 111 Fed. 96, 49 C. C. A. 244; *Lowry v. Tile, etc., Ass'n* (C. C.) 106 Fed. 46.

[1020] The plaintiff claimed the sum of \$5,000 for extra compensation for himself for extra work which he claimed he was required to bestow upon his business by reason of this unlawful combination. It was objected that this was not a proper item of claim, but the court permitted the plaintiff to offer such proofs of additional labor as he desired to submit, and the plaintiff, instead of showing facts and

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circumstances from which the jury could estimate the value of the extra services; that is to say, instead of proving the amount of additional time given to his business by showing how much time he had devoted thereto prior to November 1, 1900, and then how much additional time was required of him each day, or each week, or each month, or each year, after the 1st day of November, 1900, and during the time he was on the aggressive cutter's list—he simply stated that prior to the injury complained of the business was conducted by him, giving it a supervision only, and he was able to go abroad upon two occasions, and to devote some time to recreation and pleasure, whereas, after the combination went into operation, he was compelled to devote his entire time to his business, "except in the afternoon he could take a little recreation." There was ample opportunity offered the witness to show what additional labor he was required to bestow upon the conduct of his business, but he offered no evidence whatever other than the mere, vague, indefinite assertion that he was compelled to devote his entire time to his business after he was blacklisted "except in the afternoons he could take a little recreation," and that this indefinite bestowal of additional labor was worth \$5,000. There was no evidence in support of this claim to submit to a jury from which they could reasonably estimate what compensation he should have for any additional labor. From this they could only guess and speculate upon an amount as to this item of claim, and this a jury cannot be permitted to do.

It was claimed that it was necessary to put extra capital, amounting to \$10,000, into the business because of the existence of the combination, necessitating his paying cash for many articles which theretofore he purchased on credit, and that this extra capital was placed in the business from rents collected, from time to time, from tenants in his building at Sixteenth and Chestnut streets; but upon cross-examination it was shown that as a matter of fact, instead of proving that \$10,000 additional capital was added and used for $4\frac{1}{2}$ years as claimed, the payments of interest and taxes on the building were in excess of the amounts paid in, and the plaintiff erroneously assumed that he was entitled to interest on the rents paid in. A review of the evidence

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shows that in these two items the plaintiff failed to prove his claim:

In support of the other three items of claim, the plaintiff submitted the best evidence he could produce under the circumstances. While the law puts the burden of proof upon the plaintiff and requires the proof of such facts as will enable the jury to arrive at the amount of damage with reasonable certainty, it will not permit the defendants who are, through their wrongful acts, responsible for the plaintiff's injury, to carry this requirement beyond the measure of proof thus stated. He is required to prove his claim with reasonable certainty and no more. We think the plaintiff has complied with this require- [1021] ment as to these claims. The verdict as a whole, however, being far in excess of the total amount of these three claims, which were sustained by competent evidence, under the law it is the duty of the court to either require the plaintiff to remit this excess or, grant a new trial. The claim for extra clerk hire at \$16 per week to March 1, 1904, and at \$18 per week thereafter during the existence of the combination would make a total of \$3,164, and the damages claimed for extra cost of proprietary articles, amounting to \$7,680, together with the \$36.52 for loss of profits on sales lost, make a total of \$10,880.52 which was proven by competent evidence with reasonable certainty.

There is one other question raised which cannot properly be classed in any of the foregoing propositions, and which, it has been contended, has some bearing upon the question of whether or not plaintiff suffered any damage. The books of the plaintiff show that beginning with the year 1899 down to the time of bringing suit he drew out of the business the following amounts:

| | |
|----------------------------|--------------|
| 1899 ----- | \$5, 663. 00 |
| 1900 ----- | 6, 069. 00 |
| 1901 ----- | 7, 376. 00 |
| 1902 ----- | 7, 643. 00 |
| 1903 ----- | 5, 464. 00 |
| Seven months in 1904 ----- | 3, 071. 00 |

It was strenuously argued to the jury by counsel for the defendants that, as Loder had been able to take as much out of the business for personal service during the time the

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alleged combination and conspiracy existed as before, he had suffered no injury; and, the court having failed to call the jury's attention to this fact in the general charge, defendants' counsel took an exception to that failure, and suggested to the court before the jury retired the propriety of calling their attention to this evidence for that purpose. It was shown by the books of the plaintiff that, beginning with 1897, to November 1, 1900, he had purchased merchandise to the amount of \$223,645, which he sold at retail for \$296,739, at a gross profit of 33 per cent. on the purchasing price, making \$73,094, and during the time he was on the aggressive cutter's list he purchased merchandise at a cost of \$265,821 which he sold at retail for \$326,559, being a gross profit of 23 per cent. on the purchasing price, making a total of \$60,738. It might be here remarked that in view of the fact that the evidence showed that retail prices were generally higher during the time Loder was on the blacklist, this loss of 10 per cent. on gross profits during that time, as shown by the books, is strongly corroborative of his claim that he was compelled to purchase his drugs at an increased cost of 8 per cent.

But as to the amount the plaintiff drew out and its bearing upon the question of damage it will be remembered that he did not claim in this case any damage for a falling off of either gross or net income, because through the extra exertion and natural increase of his business, although at extra cost by reason of the combination, the gross and net income was kept up nearly to that which he made prior to the combination on much smaller purchases and sales. Progressive business men start in a small way and through their energy and business ability develop a small concern, in a short time, into one much larger and bringing far greater returns. If, by reason of a combination in violation of the Sherman act, he be made to conduct what business he does at a greater cost, though it be greater in volume, but by reason of the injury done him at a less percentage of return, and he can show this, he is entitled to collect it from those who have injured him. A calculation made from the books of the plaintiff in this case shows that although Loder through his industry and perseverance, notwithstanding the injury inflicted, did a greater volume of business, but was

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compelled to do it at a 10 per cent. less profit, and he offered evidence to prove this loss was the result of this combination and conspiracy. So that, it would seem to me, the fact of his drawing out an amount for personal compensation, which did not diminish after the combination went into effect, was under the circumstances no evidence whatever of a failure to establish an injury to his business in the elements claimed. The natural increase of his business, which was done at a greater cost, made his gross and net income sufficient to enable him to take these amounts out for his personal use, but these amounts did not in any way show that either the net or gross income during the time he was on the blacklist was greater in amount than it was before, nor could it in any way throw light upon the question of the extra cost and losses which he sustained by reason of the combination, and for that reason the court did not deem it its duty to call the jury's attention to the evidence for the purpose indicated by the defendants. The court being satisfied that the verdict is excessive in amount and being able clearly to establish by computation the amount of this excess, it is the duty of the court to grant a new trial to the defendants, unless the plaintiff, within the time hereinafter specified, files a remittitur for the excess. *Pepper & Lewis' Digest of Decisions*, 23029; *Pleasants v. Fant*, 89 U. S. 116, 22 L. Ed. 780; *Southern Pacific Co. v. Hamilton*, 54 Fed. 468, C. C. A. 441.

A decree will, therefore, be entered that the plaintiff file a remittitur in the amount of \$9,857.48 on or before February 1, 1906, reducing the verdict to the sum of \$10,880.52 or a new trial will be granted. In case a remittitur be filed reducing the verdict to \$10,880.52, the clerk is directed to multiply the said amount, to wit, \$10,880.52, by three, and enter judgment in favor of C. G. A. Loder and against Frederick Aschenbach and Adolph William Miller, trading as Aschenbach & Miller; C. F. Shoemaker and Miers Busch, trading as Shoemaker & Busch; Richard M. Shoemaker, Thomas E. Shoemaker and Benjamin H. Shoemaker, trading as Robert Shoemaker & Co.; Smith, Kline & French Company; John Wyeth & Bro. (incorporated); Valentine H. Smith & Co.; Henry K. Wampole, Albert J. Koch, S. Ross Campbell, trad-

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ing as Henry K. Wampole & Co.; Edward H. Hance, Joseph C. Hance, Anthony M. Hance, and Edward H. Hance, Jr., trading as Hance Bros. & White; H. K. Mulford Company; William R. Warner, trading as W. R. Warner & Co.; Philadelphia Association of Retail Druggists; and Thomas H. Potts, William L. Cliffe, William E. Lee, David J. Reese, George W. Fehr, Carl W. Shull, [1023] Nathan Cozens, Augustus T. Pollard, Henry C. Blair, William H. Gano, Alexander H. Frankeberger, Charles Leedom, Richard H. Lackey, Henry A. Nolte, Walter A. Rumsey, James C. Perry, E. C. Bottume, Warren H. Poley, Henry A. Borell and Charles A. Eckles, defendants, for the sum of \$32,641.56 and an attorney's fee of \$2,500 to be paid to the plaintiff's attorney.

[242] HADLEY DEAN PLATE GLASS CO. v. HIGHLAND GLASS CO.

(Circuit Court of Appeals, Eighth Circuit. January 19, 1906.)

[143 Fed., 242.]

SALE—CONTRACT TO MANUFACTURE AND DELIVER GOODS—"MORE OR LESS" AS QUALIFYING STATEMENT OF QUANTITY.—Where, in a contract for the manufacture and delivery of goods, the statement of quantity is qualified by the words "more or less," these, unless supplemented by language giving them a broader scope, apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with such a transaction.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 191.

Contracts for sales of things to be produced or manufactured, see note to *Star Brewery Co. v. Horst*, 58 C. C. A. 363.]

DAMAGES—CONTRACT—BREACH BY VENDEE—MEASURE OF DAMAGES.—

Where a contract for the manufacture and delivery of goods is repudiated by the vendee before the goods are manufactured, the measure of the vendor's damages is the difference between the cost of manufacture and delivery and the contract price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1106.]

MONOPOLIES—COMBINATION IN RESTRAINT OF TRADE—MISSOURI STATUTE IS WITHOUT APPLICATION TO INTERSTATE COMMERCE.—The anti-trust statute of Missouri (Rev. St. Mo. 1899, §§ 8965-8970) can have no application to a contract for the sale of goods to be manufactured by the vendor in another state and delivered to the vendee in Missouri, because such a contract directly relates to Interstate Com-

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merce, the regulation of which is within the exclusive authority of Congress.

SAME—SHERMAN ANTI-TRUST ACT—CONTRACT FOR SALE OF GOODS BY MEMBER OF COMBINATION.—The Act of July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], known as the "Sherman Anti-Trust Act," does not invalidate, or prevent a recovery for the breach of a collateral contract for the manufacture and sale of goods by a member of a combination formed for the purpose of restraining interstate trade in such goods.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Charles Cummings Collins (*W. F. Carter, William T. Jones, and A. R. Taylor*, on the brief), for plaintiff in error.

James C. Jones (*Lon O. Hocker, C. P. Ellerbe, C. P. Ellerbe, Jr., and Frank A. Thompson*, on the brief), for defendant in error.

Before VAN DEVANTER and Hook, Circuit Judges, and LOCHREN, District Judge.

VAN DEVANTER, Circuit Judge.

The Highland Glass Company, a Pennsylvania corporation, engaged in manufacturing glass in that state, received and accepted the following order for the manufacture and delivery of glass from the Hadley-Dean Glass Company, a Missouri corporation, carrying on the business of a jobber and dealer in glass at St. Louis:

"Book us with 200,000 sq. ft. $\frac{1}{4}$ ribbed more or less subject to sizes and delivery as required at price 5c. sq. ft. cut to size St. Louis delivery less 1% cash 10 days acct. St. L. World's Fair bldgs. Acc't Mr. Torrence. Ack."

[243] 23,056 square feet of glass was manufactured, delivered, accepted, and paid for under the contract so made. The Hadley-Dean Company then refused to furnish specifications for or to accept the remaining 176,944 feet, although the Highland Company offered and was ready and willing to manufacture and deliver the same as agreed. In an action in the Circuit Court to recover damages from the Hadley-Dean Company for its breach of the contract a verdict was directed in favor of the Highland Company for the difference

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between the cost of manufacturing and delivering the remaining glass and the contract price, and judgment was rendered on the verdict returned under that direction. The purpose in prosecuting the present writ of error is to secure a reversal of that judgment.

It is assigned as error that the court held that the order was for 200,000 square feet of glass, more or less, the latter words having their usual signification, and rejected the defendant's contention that the order was for such an amount of glass as would be required by the defendant "to fulfill its contracts for glazing the St. Louis World's Fair Buildings." No reference to the existence of any such contracts or to the amount of glass required to fulfill them is made in the pleadings or in the evidence, and it is conceded that the question presented by this assignment is to be determined by an examination of the order alone. We think it was properly interpreted. The quantity of glass is expressed in the words "200,000 sq. ft., $\frac{1}{8}$ ribbed more or less." The succeeding phrase "subject to sizes and delivery as required," merely reserved to the defendant the right to thereafter designate the sizes to which the glass should be cut and the times when it should be delivered. The still later phrase "acc't St. L. World's Fair bldgs.," while explaining the use to which the glass was to be applied, is, in point of place and grammatical arrangement, so completely separated from the expression in respect to quantity that it could not well have been intended to qualify that expression. A more reasonable view of its purpose is that it was intended to give some indication of when the glass would be required and to apprise the plaintiff of the necessity for promptly conforming to such directions as should thereafter be given for its manufacture and delivery. It was common knowledge that the time for the completion of the World's Fair buildings was limited and that a failure to complete them within that time would result in serious inconvenience and loss. True the quantity specified is qualified by the words "more or less," but it is well settled that in a contract like this these words, unless supplemented by language giving them a broader scope, apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with such

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a transaction. *Brawley v. United States*, 96 U. S. 168, 172, 24 L. Ed. 622; *Norrington v. Wright*, 115 U. S. 188, 204, 6 Sup. Ct. 12, 29 L. Ed. 366; *Pine River Logging Co. v. United States*, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164; *Id.*, 32 C. C. A. 406, 89 Fed. 907. There is no such broadening language in the order.

It is assigned as error that the damages were not measured by the difference between the market value of the glass and the con- [244] tract price, but the point may be dismissed with the statement that, under the established rule in this jurisdiction, and also in the state of Missouri where the controversy arose, where a contract for the manufacture and delivery of goods is repudiated by the vendee before the goods are manufactured, the measure of the vendor's damages is the difference between the cost of manufacture and delivery and contract price. *Kingman v. Western Mfg. Co.*, 34 C. C. A. 489, 92 Fed. 486; *Philadelphia, etc., Co. v. Howard*, 13 How. 307, 344, 14 L. Ed. 157; *United States v. Speed*, 8 Wall. 77, 84, 19 L. Ed. 449; *Hinckley v. Pittsburg Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; *Roehm v. Horst*, 178 U. S. 1, 21, 20 Sup. Ct. 780, 44 L. Ed. 953; *Black River Lumber Co. v. Warner*, 93 Mo. 374, 388, 6 S. W. 210; *Crescent Mfg. Co. v. Nelson Mfg. Co.*, 100 Mo. 325, 336, 13 S. W. 503; *Chapman v. Kansas City, etc., Ry. Co.*, 146 Mo. 481, 508, 48 S. W. 646.

There was some evidence tending to show that at the time of making the contract the plaintiff and others, not including the defendant, were in an unlawful combination to stifle competition in the sale of glass and to arbitrarily increase its price, and because of this it is contended that in directing a verdict for the plaintiff the court failed to give effect to the anti-trust statute of Missouri (Rev. St. Mo. 1899, §§ 8965-8970), and to the anti-trust legislation of Congress (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]; Act August 27, 1894, c. 349, §§ 73-77, 28 Stat. 570 [U. S. Comp. St. 1901, pp. 3202, 3203]).

Of the state statute it is sufficient to say that it can have no application to the contract under consideration without impinging upon the exclusive authority of Congress to regulate commerce among the several states. *Railroad Co. v.*

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Husen, 95 U. S. 465, 469, 24 L. Ed. 527; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 229-233, 20 Sup. Ct. 96, 44 L. Ed. 136; *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785. The contract was for the sale of glass to be manufactured by the vendor in Pennsylvania and delivered to the vendee in Missouri, and therefore directly related to interstate commerce. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 246, 20 Sup. Ct. 96, 44 L. Ed. 136; *Bement v. National Harrow Co.*, 186 U. S. 70, 92, 93, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Montague v. Lowry*, 193 U. S. 38, 47, 24 Sup. Ct. 307, 48 L. Ed. 608.

The act of Congress of August 27, 1894, is also without application because it is confined to combinations "between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States."

The act of July 2, 1890, is what is popularly known as the "Sherman Anti-Trust Act," and declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." That it does not render illegal or prevent a recovery upon this contract is shown by *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, [245] 22 Sup. Ct. 431, 46 L. Ed. 679. In that case the plaintiff sought to recover the purchase price of sewer pipe sold by it to the defendant and the latter sought to defend on the ground that at the time of the sale the plaintiff was in an unlawful combination to restrain interstate trade in sewer pipe. The court, after holding that the principles of the common law did not justify the buyer in refusing to pay for what he had bought and received, on the ground that the seller was in an unlawful combination with others to restrain trade in the article sold, said (pages 549, 550, of 184 U. S., page 435 of 22 Sup. Ct. [46 L. Ed. 679]):

"The special defense based upon the act of Congress of July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], was also properly rejected. * * * Much of what has just been said in reference to the first special defense, based on the common law, is

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applicable to this part of the case. If the contract between the plaintiff corporation and other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the time in course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

The contract for the sale of the glass being valid, it follows as a matter of course that an action lies for its breach.

No error is disclosed by the record, and the judgment is affirmed.

[358] HARTMAN *v.* JOHN D. PARK & SONS CO.

(Circuit Court, E. D. Kentucky. February 14, 1906.)

[145 Fed., 358.]

PROPERTY—SECRET PROCESS—INCIDENTS OF OWNERSHIP.—The patent and copyright statutes, in conferring upon an inventor or author the exclusive right to make, use, and sell articles embodying his invention or authorship, create in him a new right and do not extend or continue a previously existing right. The owner of a secret process not patented, has no such exclusive right to make, use, and vend the article to which it relates, but he has the right to keep his knowledge to himself and to protection of the same as a property right against one who, in violation of contract or through a breach of trust or confidence, undertakes to apply the secret to his own use or to impart it to others.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Property, § 2.

Disclosure of trade secrets, see note to *S. Jarvis Adams Co. v. Knapp*, 58 C. C. A. 8.]

SALES—RIGHT TO RESTRICT FUTURE SALES—EFFECT OF PATENT.—The owner of a patent or copyright after an absolute sale of the article

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covered thereby may, by virtue of the exclusive right given him by statute, and his right to withhold or restrict licenses under his monopoly, retain control of future trade in the article sold, as to prices of resale, etc., irrespective of any condition in the contract of sale, but the right to reserve such future control by contract is not derived from the statute, but exists if at all, by the common law, and may as lawfully be exercised by the seller of an unpatented article.

CONTRACTS—RESTRAINT OF TRADE—SALE OF ARTICLE MADE BY SECRET PROCESS.—Provisions in a contract for the sale of a secret process restraining its use or its communication to others are not invalid as in restraint of trade, because necessary to protect the property right in the subject-matter of the contract, but such considerations do not apply to contracts for the sale of the article produced by such process which are subject to the same rules as contracts for the sale of any other article of manufacture.

SAME.—A system of contracts made by the manufacturer of a proprietary medicine between him and wholesale dealers, to whom alone he sold his medicine, by which they were bound to sell only at a certain price and to retail dealers designated by him, and between him and the retail dealers by which, in consideration of being so designated, they agreed to sell to consumers only at a certain price, is not unlawful as in restraint of trade, but [359] is a reasonable provision for the protection of the manufacturer's trade, and he is entitled to an injunction to restrain a defendant from inducing other parties to such contracts to violate the same.

In Equity. On demurrer to bill.

F. W. Hinkle, F. F. Reed, and E. S. Rodgers, for plaintiff.

W. J. Shroder, Alton B. Parker, Morris & Fay, for defendant.

COCHRAN, District Judge.

This case is before me on demurrer to the bill for want of equity. The bill alleges in substance that complainant is the manufacturer and seller amongst other medicines of one known as "Peruna"; that the formula by which it is made was discovered by him, and is known only to him and his trusted employes; that he puts it up in bottles, each of which is inclosed in a loose white wrapper bearing the words "Peruna the Great Tonic" and has pasted on it a label giving its history, the theory upon which it is based, the ailments for which it is recommended, and the directions for taking it, and is serially numbered, the number being stamped both on the wrapper and label in several places;

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that he sells the medicine to wholesale druggists only, who in turn sell to retail druggists, who in turn sell to consumers; that the wholesalers to whom he sells contract with him not to resell except to retailers designated by him and at certain prices, and the retailers whom he designates contracts with him not to resell to consumers except at certain prices; that his prices to the wholesalers are uniform and so are the prices fixed by him of wholesalers to retailers and of retailers to consumers; that he alone advertises the medicine and creates the demand for it; that with each package of medicine is furnished a card containing the serial numbers of the bottles therein and the wholesalers are required to note thereon the retailers to whom same is sold, and to return it to complainant; that the defendant, a Kentucky corporation, is a wholesale druggist; that it obtains said medicine from complainant's wholesalers and retailers by false and fraudulent representations, surreptitious, and dishonest methods and persuading them to break their contracts with him, and sells same to retailers operating "cut rate drug stores" at less than the wholesale prices fixed by him, who in turn sell to consumers at less than the retail prices so fixed; that before the medicine is so sold to consumers the wrappers are removed and the labels are defaced so as to obliterate the serial numbers stamped thereon and the information thereby given; and that defendant gives out and announces that he will continue so to obtain said medicine and so dispose of it. The relief sought is an injunction against him so doing."

* * * * *

[373] This brings us to the other argument put forward by defendant's counsel in support of the contention that the system of contracts under which he sells his medicine outright and attempts at the same time to retain the control over the subsequent trade therein is unlawful. It is that said system of contracts in so far as it attempts to retain such control contravenes the common-law rule invalidating contracts in restraint of trade. The general principle upon which this rule is based, as stated by Pollock on Contracts, p. 309, is "that a man ought not to be allowed to restrain himself

* The matter omitted relates to patents rather than to unlawful restraint of trade. See first two paragraphs of syllabus.

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from exercising any lawful craft or business at his own discretion and in his own way." It is thus stated in the quotation made by him from the opinion in *Hilton v. Eskerley*, 6 E. & B. 66, 74, 75:

[374] "Prima facie, it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it [his trade] on according to his own discretion and choice. If the law has in any manner regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion."

The restraint, then, which the rule and the general principle upon which it is based have in view is a restraint which a man puts upon himself by contract with another, and not a restraint which another puts upon him. Another is without power to put any restraint upon himself except by force. He alone can otherwise put restraint upon himself, and that by contract. Such restraint in its initiation is put upon him by his own discretion and choice. The entering into the contract is voluntary on his part, and the law in relieving him from it relieves him from the consequences of his own free act. It is a restraint, not only as to whether he shall carry on any lawful craft or business, wholly or in part, but also as to the way or mode of carrying it on. The cases which have arisen under the rule have fallen into two well-defined classes. One class is where, as a rule at least, the contract is between two, and but one party thereto agrees to restrain himself in some particular for the benefit of the other party. Such contracts are usually termed contracts in restraint of trade. The most usual instance of cases belonging to this class is where the owner of a business sells it to another and agrees with such other not to engage in the same business anywhere or only in certain territory.

Mr. Justice Holmes in *Northern Securities Co. v. United States*, 193 U. S. 197-404, 24 Sup. Ct. 436, 48 L. Ed. 679, defines contracts of this class as "contracts with a stranger to the contractor's business [although in some cases carrying on a similar one] which wholly or partially restrict the freedom of the contractor in carrying on the business as he otherwise would." To the same effect, he says:

"Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business and the trade restrained was the contractor's."

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The objection to a contract of this class is its tendency to harm both the contractor and the public. The way in which it may harm the contractor is in depriving him of his livelihood in whole or in part. The way in which it may harm the public is in making him a public charge, in depriving it in whole or in part of the benefit of his activity, and in furthering an attempt at monopoly. Justice Holmes, in the opinion already quoted from, said that the objection to such contracts at common law was primarily on the contractor's own account. In early times the chance of such a contract doing harm was much greater than now. Under existing conditions, in view of the abundant opportunities for one to earn a living and the abundance of capital to go into any profitable business and its eagerness to do so, the chance of such a contract doing harm in either direction is much lessened. But all contracts of this class are not invalid, because of the restraint which they put upon one party thereto. Some are invalid, and some are not. Out of the cases that have arisen involving contracts of this kind a rule has been evolved by which it may be determined whether the contract is invalid or not. The rule is [375] if the restraint is reasonable the contract is valid; if not, it is invalid.

As said by Judge Simonton in *Hulse v. Bonsack Machine Co.*, 65 Fed. 869, 13 C. C. A. 180, the test is "as it is put in *Ammunition Co. v. Nordenfelt* (1893) 1 Ch. 630, and *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; 'Is it, in view of all the circumstances of the case, reasonable?'" In the most usual instance of such cases; that is, where the owner of a business sells it to another, and agrees with such other not to engage in the same business, what determines the reasonableness of the particular restraint involved is whether it is essential to protect the business from invasion by the contractor. If it is, it is reasonable; otherwise it is not.

Pollock on Contracts, p. 310, says:

"Public policy requires, on the one hand, that a man shall not by contract deprive himself or the state of his labor, skill, or talent; and, on the other hand, that he shall be able to preclude himself from competing with particular persons so far as necessary to obtain the best price for his business or knowledge when he chooses to sell."

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Judge Severens, in *Jarvis v. Knapp*, 121 Fed. 34, 58 C. C. A. 1, says:

"The underlying principle upon which the modern cases upon this subject are grounded is that, although one cannot stifle competition by a bargain having that purpose only, yet when he purchases something or acquires some right, the value of which may be affected by the subsequent conduct of the seller, the purchaser may lawfully obtain the stipulation of the seller that he will refrain from such conduct."

The principle of absolute freedom of trade which in certain instances requires that a contract imposing restraint shall give way, in such a case, enforced by the principle of absolute freedom of contract requires that it shall remain binding. But whilst this is the most usual instance of cases involving contracts where the restraint imposed is reasonable and the contract therefore valid, there are other instances of such cases which often arise

Judge Taft, in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, undertakes to specify the instances of such cases. They are as follows:

"Agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere by competition or otherwise with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant or agent not to compete with the master or employer after the expiration of his time of service."

As to what is essential to the validity of such agreements, he says:

"Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1 and 2) to the enjoyment by the buyer of the property, good will or interest in the partnership bought; or (3) to the legitimate ends of the existing partnership; or (4) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (5) to protection from danger of loss to the employer's business caused by the unjust use on the part of the employé of the confidential knowledge acquired in such business."

Then, as to whether his classification embraces all the possible instances of such cases, he said:

[376] "It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at common law; but it certainly would seem to follow from the tests laid down for determining the validity of such an agreement

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that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party."

The other class of cases which has arisen involving the restraint of trade rule is where the contract is between two or more persons engaged in the same business, sometimes including all the persons so engaged in a particular locality or everywhere; but each one engaged separately, and with no concern or interest in the business of any other one, and each one agrees to restrain himself in some particular for the mutual benefit of all. Such contracts are termed by Page, in his work on Contracts, "monopoly contracts," and in Anti-Trust Act, June 10, 1890, c. 407, 26 Stat. [U. S. Comp. St. 1901, p. 1886], "combinations or conspiracies in restraint of trade." Mr. Justice Holmes, in the opinion already quoted from, defined them as "combinations to keep strangers to the agreement out of the business." This would seem, however, not to be full enough. They include combinations to enhance prices in other ways, as by dividing territory, limiting output, fixing prices, or in any other way. Judge Taft defines them as "contracts having no purpose but to restrain competition and maintain prices." Judge Severens, in the quotation already made from his opinion in *Jarvis v. Knapp*, refers to them as bargains having the purpose only to stifle competition. The objection to contracts of this class, as stated by Mr. Justice Holmes, is "not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm, and their supposed consequent effect upon the public at large." Where, however, the purpose of the contract is to enhance prices otherwise than by keeping strangers out of the business the objection to it is for its direct effect upon the public at large. It is in contracts of this kind that the modern disposition to reduce competition and create monopolies has mostly manifested itself.

Page, in his work on Contracts (section 373), says that such contracts are "always illegal." And such I under-

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stand to be the drift, at least, of Judge Taft's opinion in the *Addyston Pipe & Steel Co. Case*.

In view, then, of this difference between these two classes of cases as to the validity of the contracts belonging to them, in the one class, the contract being valid if the restraint is reasonable; in the other class, the contract probably being invalid without any reference to the question of reasonableness, it is important to determine to which class the system of contracts involved herein belongs. If it belongs to the second class, then probably we have nothing more to do than to locate it. If it belongs to the first class, then, if the restraint is reasonable, the system of contracts is certainly valid. In any event, it will add to clearness of thought to locate it. But before attempting to do this, a suggestion of complainant's counsel [377] should be considered and disposed of. It is that said system of contracts is not affected by the restraint of trade rule solely because complainant's medicine to which it is applied is an article made under a secret process. They would seem to contend that no contract by the purchaser of an article made under a secret process restraining himself as to what he should do with it is within the restraint of trade rule simply because it is made under such a process. That the nature of the property sold may of itself determine that a restraining contract in relation thereto is not affected by the rule, must be conceded. A patentee may assign his patent right and enter into a contract restraining himself with reference thereto.

In the case of *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S. 24-43, 11 Sup. Ct. 478, 35 L. Ed. 55, Mr. Justice Gray said:

"A covenant by the assignor of letters patent for an invention that he will not himself make, use, or sell the patented article is undoubtedly valid, because the act of Congress which creates the monopoly expressly authorizes it to be assigned as a whole."

The same is true as to a grant by a patentee of his patent right, which is an assignment for a particular territory, and for the same reason. So a patentee may grant a license and enter into such a contract with reference thereto.

In the case of *Vulcan Powder Co. v. Hercules Powder Co.*.

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96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242, Judge McFarland said:

"As a patent is a sort of monopoly the owner may manufacture under it or not as he pleases, and may make either a partial or entire assignment of it, and may protect his assignee, not only by an agreement not to use the patent (which would be unnecessary, because such use would be an infringement), but by a covenant not to interfere in any way with the profits to be derived from the assigned patent.

To the same effect are the following cases, to wit: *Morse v. Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Good v. Daland*, 121 N. Y. 1, 24 N. E. 15; *Bonsack v. Machine Co.* (C. C.) 70 Fed. 383.

Likewise, in relation to the patented thing, as we have seen, the purchaser thereof may be restrained as to the use of it by him. This, however, is effected without any restraining contract on the part of the purchaser, simply by the seller, the owner of the patent, limiting the license as to what the purchaser may do therewith. Again, a restraining contract in relation to a secret process is valid simply because of the nature of the property to which it relates. The existence and value of a secret process as property depends upon the fact that its secrecy can be maintained by a restraining contract. Hence one to whom it is communicated by the owner may by contract restrain himself as to the use he is to make of it.

In the case of *Harrison v. Glucose Sugar Refining Co.*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915, Judge Jenkins said:

"In such a case it may well be doubted if the rule with respect to restraint of trade should apply, because these secrets of business are the property of the appellee, to which the public has no right, and may not justly insist that it shall receive the benefit of the appellant's services through breach of confidence. * * * In all such cases courts have uniformly enjoined the delin- [378] quent party from engaging in the business from which he has agreed to refrain and from disclosing the secrets of the business which he has thus acquired."

It was on this principle that it was held by the Supreme Court in *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, that contracts of telegraph companies with the Board of Trade of Chicago, by which said companies agreed not to communicate quotations of prices for wheat, corn, and provisions offered and accepted in its exchange which they received from it, to persons who

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were not in contractual relations with it and approved by it, were valid. Mr. Justice Holmes said:

"But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly and no contract in restraint of trade, either under the statutes or at common law."

So, likewise, the owner of a secret process in selling it to another may, by contract, restrain himself not thereafter to use it or to divulge it to others. In the case of *Central Transportation Co. v. Pullman Palace Car Co.*, *supra*, Mr. Justice Gray said:

"Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is used."

In the case of *Ammunition Co. v. Nordenfeldt*, 1 Ch. 630, L. J. Bowen said:

"Sales of secret processes are not within the principle or the mischief of restraint of trade at all. By the very transaction in such cases, the public gains on the one side what it lost on the other, and, unless such a bargain was treated as outside the doctrine of general restraint of trade, there could be no sale of secret processes of manufacture."

To the same effect are the cases of *Vickery v. Welch*, 19 Pick. (Mass.) 523; *Jarvis v. Peck*, 10 Paige (N. Y.) 125; *Hard v. Seeley*, 47 Barb. (N. Y.) 428; *Alcock v. Giberton*, 5 Duer. (N. Y.) 76; *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475; *Simmons Medicine Co. v. Simmons* (C. C.) 81 Fed. 163; *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67.

It is therefore true, as stated by Judge Scott, in *Standard Fire Proofing Co. v. St. Louis Co.*, 177 Mo. 559, 76 S. W. 1008, that:

"Patented inventions and secrets of art or trade not patentable are not within the purview of the rule against restraint of trade."

But what we have to do with here is not the secret process by which complainant's medicine is made. It is the medicine itself, made under the process. The secret process and the medicine made under it are separate and distinct things, and each is a subject of ownership. One person may own one and another person the other. The question has been argued whether a sale of an article made under a secret pro-

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cess is a publication of the process. It is and it is not. It is, if and when one can by his own ingenuity ascertain therefrom the process by which it is made. Until he so ascertains it, there has been no [379] publication of the process; and in the meantime the ownership of the secret and the right to its protection is as full and complete as if no sale had ever been made of the article embodying the secret process. But still, as stated, such article is not the process and the rights with reference to each are different. What is there, then, in the nature of the articles made under a secret process to occasion any difference between them and articles not so made or between them and articles which one may not have made at all, but simply owns, in the matter of the validity of restraining contracts entered into by purchasers thereof from the owner? It is hard to conceive of any. It is true that the manufacturer and owner of the articles made under the secret process may refrain from making them and selling them to purchasers, and thus putting them upon the market. Equally so, the manufacturer and owner of any other articles may refrain from so doing. So, also, the owner of articles that he has not made, but has purchased or otherwise obtained from the manufacturer may refrain from selling them to purchasers and thus putting them upon the market. Suppose that the owner of a patent should sell all the articles made under it to another with license to use or resell them, thus passing them outside of the monopoly of the patent in the hands of the purchaser, would the mere fact that they had been made under the patent lend any sanctioning force to a restraining contract entered into with reference thereto by a subpurchaser thereof? I must conclude, therefore, that the fact that complainant's medicine has been made under a secret process has no effect whatever on the validity of the system of contracts involved herein. He has no greater rights in relation thereto, as distinguished from the secret process under which it was made, than the owner of any other tangible personal property, whether made by him or not, would have in relation to such property. Nor can the fact that he sells it under a trade-mark and a certain dress, which no one else has the right to use, even if he did by his own ingenuity ascertain the secret process by which it

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is made and thus became enabled to make and sell it, make any difference. No reason occurs to me why the owner of goods trade-marked and peculiarly dressed should have the right to obtaining a restraining agreement from the purchaser of his goods, and the owner of goods not so marked or dressed should not have such right. All goods have some dress, and if not trade-marked are marked with the name of the seller. If, then, such a system of contracts is valid, as applied to complainant's medicine, it would be equally valid as applied to any other article of tangible personal property owned by the one so applying it. The validity of that system depends entirely, therefore, upon the question as to which of the two classes of contracts involving the restraint of trade rule it belongs, and if it belongs to the first class, whether under all the circumstances it is reasonable.

To which class, then, does it belong? The only ground for claiming that it belongs to the second class is that its purpose is to maintain the prices of complainant's medicine to the retailers and consumers. There is nothing in them, beyond the uniformity of price [380] provided for, to affect competition amongst different wholesalers and amongst different retailers. The contracts are not between persons engaged in the same business. One set of them is between complainant, who is a manufacturer, and wholesale druggist; and the other set is between him and retail druggists. A separate contract is entered into between complainant and each wholesaler and between him and each retailer. In each contract between complainant and a wholesaler, there is a purchase of medicine by him and an agreement on his part to restrain himself as to the persons to whom and the price at which he resells. And in each contract between complainant and a retailer there is an agreement on his part that if he is designated as a purchaser from wholesalers to restrain himself as to price at which he resells to consumers. It is true that these contracts cover the entire trade in complainant's medicine, which fact defendant's counsel emphasize, but there is here no combination between persons engaged in the same kind of business to regulate their respective businesses for their mutual benefit to the harm of strangers or the public at large. It would seem that each of the contracts in complain-

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ant's system comes within the fourth of the five subclasses into which Judge Taft divides the first class of contracts. If complainant sold his medicine to consumers as well as manufactured it, and should make a single contract with a retailer in the market where he sold by which he sold to the retailer a lot of his medicine to resell to consumers, and the retailer agreed not to sell it at less than the price at which complainant was selling it, and thus undersell and compete with him for consumers, it would present a case clearly within said fourth subclass, and the validity of the restraint which such retailer thus put upon himself would depend upon its reasonableness, that in turn depending upon whether the restraint was reasonably necessary to the prevention of possible injury to complainant from use by the retailer of the medicine sold to him. The cases cited by Judge Taft in illustration of this fourth subclass each involved a single sale and agreement. Those cases are as follows, to wit: *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619, 27 C. C. A. 634; *Hitchcock v. Anthony*, 83 Fed. 779, 28 C. C. A. 80; *Oregon Navigation Co. v. Winsor*, 20 Wall. (U. S.) 64, 22 L. Ed. 315; *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746; *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816.

In the *American Strawboard Co. Case*, that company owned and operated a number of strawboard mills. It conveyed one of them to the *Haldeman Paper Company*, which agreed not to manufacture strawboard at said mill for 20 years. In the *Anthony Case*, Anthony was lessee of a dock upon which he conducted the business of dealing in coal and fish and conveyed another dock near by to *Hitchcock*, a dealer in lumber, who agreed not to engage in the coal or fish business or do anything that would conflict with the grantor's business for seven years. In the *Oregon Navigation Company Case*, that company was engaged in navigating the Columbia river in Oregon and Washington. It had purchased the steamer *New World* from the *California Navigation Company*, which was engaged in navigating California waters, and had agreed with it not to employ said steamer in California waters. It sold the steamer

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to Winsor, who was engaged in navigating Puget's Sound. He agreed not to use it in California waters or Columbia river for 10 years. In the Gregory Case, Gregory, who was engaged in navigating Hudson river between New York, Albany, and Troy sold a two-thirds interest in steamboat Robert L. Stevens to Dunlop, who agreed not to use it at any time thereafter as a passage boat on Hudson river above the village of Saugerties. In the Hodge Case, Hodge's testator, who was engaged in the business of selling sand from land he owned, conveyed a piece of the land to Sloan who agreed he would not sell any sand from it. In each case it was held that the restraining agreement was valid. Had there been in each case any number of similar sales of similar property with similar restraining agreements, each transaction would have belonged to the fourth subclass, and the restraining agreement in each would have been dependent upon its reasonableness for its validity. Their numerousness would not affect their nature. It may be said, however, that complainant does not sell save to wholesalers to resell to retailers and that therefore neither the wholesalers nor retailers are possible competitors of complainant and the restraining agreements entered into by the wholesalers and retailers are not to prevent or affect their using the medicine in competition with him, and, hence, do not come within the letter of that fourth subclass, which covers agreements by the buyer of property not to use the same in competition with the business retained by the seller. This may be true. But the spirit of the subclass covers restraining agreements by the buyers of property to prevent their using it in any other way than by competition so as to injure the business of the seller. The principle involved in this subclass is that, if one in business sells property to another and such property may be used by the purchaser in a way to injure the business of the seller or to render it less profitable than it would otherwise be, a restraining agreement on the part of the purchaser as to the use of it may be reasonable under the circumstances of the case, and if so, valid.

Judge Taft, in Addyson Pipe & Steel Co. Case, in leading

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up to the classification which he made of the cases coming within the first class, said :

"When one in business sold property with which the buyer might set up a rival business it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict."

It would be equally reasonable that the buyer should be able to restrain himself from using the property in any other way than setting up a rival business, so as to do the seller an injury which but for the sale he would be unable to inflict. But whether or not the system of contracts involved here comes within said fourth subclass, they are certainly covered by the language used by Judge Taft to take in any possible omissions from the classification he made. In each contract the restraining agreement is ancillary or collateral to the main purpose of a lawful contract, to wit, a sale of the medicine, [382] and, according to complainant's claim, it is necessary to protect him from an unjust use of the legitimate fruits of the contract by the purchaser. I therefore conclude that the system of contracts involved herein belongs to the first class, and that its validity depends solely upon its reasonableness. Is it reasonable, then, that complainant should have the right to put in force the system of contracts involved herein and obtain from his vendees and subvendees restraining agreements from the vendees, as to whom and at prices at which they shall resell, and from the subvendees as to the prices at which they shall resell? A question arises here as to the party on whom lies the burden as to the reasonableness. Is it on complainant to show that the restraint in question is reasonable, or is it on defendant to show that it is unreasonable?

Judge Simonton, in *Hulse v. Bonsack Machine Co.*, supra, says:

"This is not literally an agreement in restraint of trade. It is simply a contract which by analogy can be likened to one, and the analogy should not be pushed beyond the reason for it. There is no presumption that such a contract is void. The presumption is in favor of the competency of the parties to make the contract and the burden is upon the party who alleges that it is unreasonable or against public policy."

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On the other hand, Beach on Contracts, vol. 2, § 1562, says:

"Many authorities declare in substance that all restraints are presumed to be bad, but, if the circumstances are set forth, that presumption may be excluded, and the court judges of these circumstances whether the contract be void or not."

I do not find it essential in this case to locate the burden, as I hold that under the allegations of the bill, which are admitted by the demurrer, said system of contracts as applied to complainant's medicine is reasonable. The circumstances which lead me to this conclusion are these: That complainant's vendees and subvendees should be so restrained is advantageous to complainant's business. It would be an injury to it from them not to be so restrained. Exactly how it is so advantaged and how it would be injured by a removal of the restraint has not been developed in the argument; and I do not feel sufficiently advised as to such matters to say as to this. It would seem that the existence of such a system of contracts in relation to complainant's medicine would tend to prevent demoralization in the trade therein through competition amongst his vendees and subvendees, and enable him to maintain the prices for his medicine. But, however this may be, it is alleged in the bill that before complainant established and put said system in force the "cut rate" or "cut price" system had resulted in much confusion, trouble, and damage to complainant's business, and had injuriously affected the reputation and depleted the sale of his medicine, and that it was established and put in force to protect his trade, custom, and business, and the manufacture and sale of his medicine; that it prevents cutting of prices and demoralization of trade both wholesale and retail, greatly benefits him by increasing the sales of and demand for his medicine, and is of great value to him in his business; and that it has been of great benefit and advantage to him and his business, and has increased his [383] trade and business. It is further alleged that the prices which he and his vendees and subvendees get for his medicine are reasonable. These allegations must be accepted as true. The vendees and subvendees would not have the opportunity to sell his medicine

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if he did not make and sell it. He thus brings trade to them. By fixing a uniform price on his medicine on sales by himself to the wholesalers, on sales by wholesalers to retailers, and by retailers to consumers, all purchasers, wholesalers, retailers, and consumers are treated alike, the large wholesalers have no advantage over the small ones, nor the large retailers over the small ones. All sellers and all consumers are treated alike. Complainant creates the demand for the medicine, as he alone advertises it. And, finally, complainant could accomplish the very same result by a different system, against which no legal complaint could be made. This would be by a system of agencies. Though the nature of complainant's medicine; i. e., its being an article made under a secret process, may not, without more, determine the validity of the system of contracts in question, it cannot be said that it does not add to the reasonableness of said system as applied to it. Complainant not only owns it and makes it, but no one else can make it, and if they could they could not sell it under his trade-mark and dress.

How, then, does the matter stand upon authority? The whole trend of authority is favorable to the validity of the system. The sweeping principle which has taken form in Judge Taft's five classes and in the general statement to cover any omissions therefrom upholds it. But there are a number of decisions more directly in point. They are as follows, to wit: *Elliman v. Carrington* (1901), 2 Ch. 275, 84 L. T. (N. S.) 853; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Walsh v. Dwight* (Sup.) 58 N. Y. Supp 91; *Park & Sons Co. v. National Wholesale Druggists*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; *Whitwell v. Tobacco Co.* 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689.

In *Elliman v. Carrington*, the plaintiffs were manufacturers of Elliman's Royal Embrocation for horses and cattle and Elliman's Universal Embrocation for human beings. They sold it to the defendants, who bought wholesale to sell to others at retail. The latter agreed not to sell below certain prices and not to sell to others unless they agreed not to sell below certain prices. They broke the latter part of the agree-

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ment which was the occasion of the suit. It was held that the agreement was valid. Mr. Justice Kekewich said:

"The [plaintiffs] are not bound to sell the embrocation at all; they are not bound to manufacture it. They are at liberty to do so as they please, and when they have manufactured it, they are at liberty to sell it at whatever price they choose to fix, it may be a prohibitive one or it may be such a small price that they cannot make any profit out of it. That is entirely for their consideration. There are no goods which the owner thereof may not lawfully retain or sell at such price as he pleases."

Again he says:

"Why should not Elliman's Sons & Co. be at liberty to fix the price in that way? Nobody has argued and it could not possibly be argued that they are not at liberty to fix the price in the first sale to Carrington & Son. Why [384] should they not be at liberty to make the further bargain with Carrington & Son that they shall not sell it below a certain price? It is said that the contract is in restraint of trade. In one sense it is, but it is just as much and no more in restraint of trade for Elliman's Sons & Co. to say that they will not sell at all. It seems to me, to say the least, that what is restraint of trade as regards Carrington & Son is really the liberty of trade as regards Elliman's Sons & Co. The cases which have been cited are well-known authorities expounding a great principle, and showing what exceptions there are to that principle. But this case seems to me not to fall within any principle or exception. I do not think that it is touched by the authorities at all. It is merely a question of whether a man is entitled when he is selling his own goods to make a bargain as to the use to be made of them by the purchaser. It is said that the contract is against public policy, but that phrase merely embodies for the present purpose the great principle of restraint of trade, and to say that it is to prevent Elliman's Sons & Co. from exercising their own discretion, seems to me to be applying a well-settled principle of law to facts to which it cannot have any possible application."

It is to be noted that though the article which was sold in this case was probably made under a secret process, no emphasis was laid upon the fact. The reasoning applies equally well to any article which one may own, whether he made it or not, and which he sells for purpose of resale.

In *Garst v. Harris*, the plaintiff sold Phenyso-Caffein, a proprietary medicine, to defendant, who agreed not to sell it below a stipulated price, and a certain sum was agreed on as liquidated damages. The action was brought for a breach of this agreement to recover said sum. It was held that the agreement was valid.

Holmes, C. J., said:

"It is said that the contract was unlawful as in restraint of trade. * * * When, as here, there is a secret composition, which the defendant presumably would have no chance to sell at a profit at all, but for the plaintiff's permission, a limit to the license, in the form of a restriction of the price at which he may sell, is proper enough."

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It is true that the fact that the article sold was a secret composition was emphasized. But the reasoning used was equally applicable to any other article; as to any other article sold the purchaser would not have had any chance to sell that particular article, however it may have been as to other articles of the same kind, at a profit at all, but by the seller's permission.

Point is made as to these two cases that in each but a single contract was involved, and not a system of contracts as here. That is true, but no doubt there was a system of contracts in each of those cases as here. A single contract; i. e., a contract with a single purchaser, would hardly have been of any value to the seller. It was only by a system of contracts; i. e., a contract with every purchaser, that he could hope to accomplish anything. This must have been had in view by the court, as no point was made of the fact that there was but a single contract involved, and the reasoning was applicable to a system.

In *Walsh v. Dwight*, the defendants were manufacturers and sellers of saleratus and soda, articles in common use and capable of being manufactured by any one, which was known on the market as "Dwight's Cow Brand Saleratus and Soda." They sold these articles to job- [385] bers under contracts, whereby the latter, in consideration of a certain discount, agreed not to resell same or any other saleratus or soda at less than certain prices. The plaintiffs were rival manufacturers of saleratus and soda, and the suit was to recover damages sustained by them because of defendant's system of contracts. It was assumed that plaintiffs had a right of action if the system of contracts was invalid and the disposition of the case was made to turn on its validity. It was held to be valid. Judge Ingraham said:

"It is difficult to see upon what ground it can be claimed that such a contract is illegal. That the defendants would have the right to establish agencies for the sale of their goods, or to employ others to sell them, at such prices as the defendants should designate, cannot be disputed. Nor can it be that a manufacturer of merchandise cannot agree to sell to others upon condition that the vendee, in selling at retail, should charge a specified price for the goods sold, or should sell only the manufactured product of the manufacturer. If a dealer in articles of this kind, for his own advantage, agrees to confine his business to a particular line of goods, or agrees with the manufacturer to charge a particular price for the articles which he sells in his busi-

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ness, such an agreement is not illegal, as in restraint of trade or as tending to create a monopoly, as there is nothing in the agreement to prevent others from engaging in the business, or the manufacturers of other articles from selling their products to any one who is willing to buy. There is nothing to prevent any individual from selling any property that he has at any price he can get for it. Nor is there any reason why an individual should not agree that he will not sell property which he owns at the time of making the agreement, or which he thereafter acquires, at less than at a fixed price; and certainly a contract of this kind is not one which exposes the parties to it to any penalty, or subjects them to any action for damages by those whose business such a contract has interfered with."

The case of *John D. Park & Sons Co. v. National Wholesale Druggists Association* was a suit by the defendant herein against an association of wholesale druggists to recover damages alleged to have been occasioned by said association causing manufacturers of medicines to refuse to sell to this defendant on the same terms as it sold to members of said association unless it would enter into a contract by which it agreed not to resell same at less than certain prices, a contract similar to that which each member of said association had entered into with said manufacturers. It was held that the system of contracts was valid, and this defendant was not entitled to recover. There was a dissent by three of the judges. One dissent was based upon the ground that, though the manufacturers had a right voluntarily to put in force such a system of contracts, it was illegal for the jobbers to drive them to put in force said system by refusing to deal with them unless they did. Another dissent was based upon the ground that jobbers required the manufacturers not only to sell at the same price to each jobber, but to compel each jobber to sell to the consumers at the same price. "It is in this respect" it is said "that the agreement is vicious and operates in restraint of trade for it destroys competition among the jobbers." The force of the decision is weakened somewhat by the consideration that it is not entirely clear that the court did not think that the medicine to which the system of contracts was held lawfully applicable had been patented. The reasoning of the opinions rendered on behalf of the majority of the court, how- [386] ever, is not based on the fact that they had been patented. It is equally pertinent to proprietary medicines. This case suggests that

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possibly complainant was driven to adopt its system of contracts by the organization of wholesale druggists.

In *Whitwell v. Tobacco Co.*, the defendant was a manufacturer of tobacco and the plaintiff a jobber therein. The defendant's method of doing business was to fix the prices of its goods so high to those who did not agree to refrain from dealing in the commodities of its competitors that their purchase was unprofitable, while it reduced the prices to those who did so agree so that the purchase of the goods was profitable to them. The plaintiff applied for a purchase, but refused to so agree, and, upon his so refusing, the defendant refused to sell to him. He then brought the action to recover damages for the refusal. It was held that he could not, that such an agreement on the part of a jobber was legal, and that the defendant had a right to refuse to sell to him unless he would enter into it. Judge Sanborn said:

"The tobacco company and its employé sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering them goods at lower prices or on better terms than they secured from that company. The tobacco company and its employé were not required, like competitors engaged in public or quasi public service, to sell to all applicants who sought to buy, or sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomever they chose, and to fix different prices for sales of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral. It had no necessary effect to directly and substantially restrict free competition in any of the products of tobacco, and it did not unlawfully restrain interstate commerce, because it in no way restricted the exercise of the rights of the competitors of the tobacco company to fix the prices of their goods and the terms of their sales of similar products according to the dictates of their respective wills."

Besides these cases there is that of *Dr. Miles Medical Co. v. Goldthwaite (C. C.)*, 133 Fed. 794. The force of this decision, however, is weakened by the fact that there no argument was made on behalf of defendant. I have also been referred to certain unreported decisions upholding the

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validity of complainant's system of contracts. There are decisions by Judge Lochren in the case of *Hartman v. Hughes*, pending in the United States Circuit Court for the district of Minnesota, rendered July 14, 1905; by Judge Kohlsaatt, in the case of *Dr. Miles Medical Company v. Platt*, pending in the United States Circuit Court for the Northern District of Illinois, Eastern Division, rendered 19th day of January, 1906; and by Judge Tuley in the case of *Platt v. National Association of Retail Druggists*, pending in the circuit court of Cook County, Ill., rendered January 24, [387] 1905. But in none of these cases apparently did the judges have to reckon with the line of argument that is presented here, and though reaching the same conclusion, I have proceeded along different lines. It is to be noted that this is not a case where the manufacturer undertakes to maintain retail prices for the sale of his goods by a direct restrictive agreement with the wholesaler, and by affixing labels to the goods charging all subsequent transferees with notice of the conditions under which they were originally sold. A case of that sort presents the interesting question whether in this way the manufacturer can maintain the retail prices of his goods, i. e., whether the doctrine laid down in *Tulk v. Mchay*, 2 Ph. 774, by which covenants restricting the use of land are enforced against purchasers with notice should be extended to chattels.

The cases of *New York Bank Note Co. v. Hamilton, etc.*, Co., 28 App. Div. 411, 50 N. Y. Supp. 1093; *Murphy v. Christian Press, etc., Co.*, 38 App. Div. 426, 56 N. Y. Supp. 597, have been cited as holding that it should, and the cases of *Taddy & Co. v. Stevens & Co.*, 20 T. L. R. 102, Eng. Ch. D.; *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; as holding that it should not. In the case of *De Mattos v. Gibson, De Gex & Jones*, 276, the doctrine was applied to a steamboat. Lord Justice Knight Bruce said:

"Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase acquires property from another with knowledge of a previous contract, lawfully, and for a valuable consideration made by him with a third person, to use and employ the property for a particular purpose, and in a specified manner, the acquirer shall not, to the material damage of the third person, in opposi-

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tion to his contract, and inconsistent with it, use the property in a manner not allowable to the giver or seller. The rule applicable alike in general, as I conceive, to movable and immovable property, recognized and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances; but I see at present no reason for any exception in the instance before us."

Here, however, the retailers enter into a contract directly with the complainant upon a valuable consideration, to wit, their being designated as retailers to whom the wholesalers may sell, and the question is whether they are bound by such contract. I therefore conclude that the complainant's system of contracts is valid. The position is taken in brief on behalf of defendant that the system of contracts is invalidated by the federal anti-trust act of 1890; but I understand that this position is not insisted on. I therefore make no further reference thereto.

The general demurrer is overruled. There is a special demurrer to so much of the bill as seeks an injunction restraining defendant from removing the dress from complainant's bottle and mutilating the label. It is urged that if the system of contracts is upheld and enforced the complainant will have no occasion for such relief. This does not occur to me as sufficient reason for his not obtaining it.

The special demurrer is also overruled.

[51] DELAWARE, L. & W. R. CO. v. KUTTER ET AL.

(Circuit Court of Appeals, Second Circuit. May 22, 1908.)

[147 Fed. 51.]

APPEAL AND ERROR—CASE TRIED TO COURT—GENERAL FINDING—MATTERS REVIEWABLE.—When, upon a trial without a jury in a federal court, the findings of fact and of law by the court are general, exceptions to a ruling denying a motion for judgment for the defendant present for the consideration of an appellate court the question whether upon the whole evidence, with all the inferences which a jury could justifiably draw from it, the plaintiff was entitled to recover; the general finding is to be accepted as equivalent to the verdict of a jury on all matters of fact, and the appellate court cannot review the weight of the evidence.

JUDGMENT—MATTERS CONCLUDED—SECOND ACTION ON DIFFERENT DEMAND.—When a judgment is offered in evidence in a subsequent

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action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action, and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence; but every matter necessary to the disposition of the case as made by the pleadings is included in the conclusive effect of the judgment.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1248-1258.]

SAME.—An action to recover a sum of money alleged to be due from defendant to plaintiff under a contract, and a subsequent action for wrongful termination of the contract by defendant, although based upon the same contract, are upon different demands, and where the only defense pleaded in the first action was a breach of the contract by plaintiff, a judgment in his favor therein is conclusive only upon that question in the second action, unless it is shown that other matters were actually litigated and decided.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1248-1258.]

RAILROADS—CONTRACT TO SECURE TRAFFIC—VALIDITY—MONOPOLIES—CARRIERS—UNDUE PREFERENCE.—Defendant railroad company entered into a contract with plaintiff for a term of years to build up, develop, and conduct the business of the transportation of milk on its lines of road. Plaintiff was to have full charge of such business and was to receive as compensation a percentage of the freights earned therein. It was provided that he should charge rates not in excess of those charged by competitive roads, and should be granted the exclusive privilege of transporting milk over defendant's lines "so far as it was permitted to do so by law." In the execution of the contract all rates were made by defendant, and plaintiff was not given a monopoly of the milk traffic. *Held*, that such contract was not ultra vires nor void as contrary to public policy, especially as practically construed by the parties in its execution; nor was it in violation of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], or of section 3 of the interstate commerce act of Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155] as giving an undue and unreasonable preference to plaintiff.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 434; vol. 9, Cent. Dig. Carriers, §§ 83-85; vol. 35, Cent. Dig. Monopolies, §§ 10, 12.]

CONTRACTS—RULES OF CONSTRUCTION—LEGALITY.—The fundamental rule is that a contract will be construed, if possible, as having been made for a legal, rather than for an illegal, purpose and it should not be relaxed when a vicious construction is sought for by the party who made the contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 734.]

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In Error to the Circuit Court of the United States for the Eastern District of New York.

W. D. Guthrie and *H. D. Hotchkiss*, for plaintiff in error.

Augustus Vaulbyck, for defendants in error.

Before WALLACE, LACOMBE and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge.

The plaintiff in error was the defendant in the court below, and by this writ of error seeks to review a judgment for the plaintiffs in an action tried by the court without a jury. The action was brought to recover damages for the breach by the railroad company of a contract dated July 9, 1886, made with Robert E. Westcott, which was to remain in force for the term of 10 years, and the duration of which was extended September 30, 1892, for the further term of 5 years.

By the terms of the contract Westcott undertook to use his best endeavors "to build up, develop, increase, facilitate, and conduct the business of transportation of milk" over the lines of the defendant's railroad; that he would be wholly responsible for the milk transported over said lines, and save the defendant harmless from all claims arising from or connected with the milk business, except those from accidents and casualties to its trains or its own negligence; that he would save the defendant harmless from all liability for loss of life or injury to any person doing business over its lines on his account; that he would not charge for transportation of milk "rates in excess of those charged by competitive railroads for similar services;" and that he should monthly pay over to the defendant 80 per cent. of all charges collected by him for the transportation of milk during the preceding month, retaining 20 per cent. thereof in full compensation for his own services. The defendant on its part undertook to receive, load, and transport, at and from all stations on its lines, all the milk furnished at said stations for transportation, and to transport the same upon its trains at such times as might be best calculated to pro-

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mote its business; that it would not permit any of its agents or servants to do any act to prevent or interfere with the developing, building up and conducting of the milk business of Westcott, and would grant him the exclusive privilege of transporting milk over the said lines "so far as it was permitted to do so by law;" that it would furnish sufficient depot accommodations for the conduct of the milk business, render such assistance to the messengers of Westcott accompanying the milk trains as might be necessary for the prompt loading and unloading of such milk, and promptly retransport and return to the several stations the empty milk cans used in the transportation of the milk. The contract was by its terms "subject to revision after three years, and at the end of any one year thereafter on giving three months' notice," and in case of any difference between the parties, provided for a submission to arbitration.

By its answer the defendant admitted the execution of the contract and alleged as a justification for terminating it (1) that the contract was ultra vires, and contrary to public policy; (2) that it was made in violation of the acts of Congress known as the "Anti-Trust Act" and the "Interstate Commerce Act;" and (3) that Westcott had violated the contract by entering into other contracts with competitive railroads inconsistent with his duty to the defendant and the obligation of his contract.^a

* * * * *

[62] The contention that the contract was void by the act of Congress (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) to "protect trade and commerce against unlawful restraints and monopolies," may be briefly disposed of. The contract undoubtedly operated upon interstate commerce as well as upon interstate [63] traffic; but if the views which we have expressed are correct as to its meaning and effect, it did not have any tendency to create a monopoly, or evidence any conspiracy in restraint of trade. It could only operate in restraint of trade by permitting Westcott to charge such extortionate rates to milk shippers as would discourage shippers; and this it did not permit or contemplate.

^a The matter omitted does not relate to anti-trust law. See the first three paragraphs of the syllabus.

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The contention that the contract contravened the provisions of the interstate commerce act may likewise be briefly disposed of. The argument for the plaintiff in error is that the contract is obnoxious to section 3 of that act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]) because it gave an undue and unreasonable preference to Westcott in the business of transporting milk. That act deals with the effects or results of contracts, and has no operation directly upon the contracts themselves; but assuming that the contract is void if the contention that it gave an undue and unreasonable preference is sound, the case is not one where any such preference was given. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another. *Wight v. United States*, 167 U. S. 516, 17 Sup. Ct. 822, 42 L. Ed. 258. The mere circumstance that there is, in a given case, a preference or advantage, does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. *Texas & Pacific R. R. Co. v. Interstate Commerce Com.*, 162 U. S. 219, 220, 16 Sup. Ct. 666, 40 L. Ed. 940. To come within the inhibition of the act "the positions of the respective persons or classes between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other." *Interstate Commerce Com. v. B. & O. R. R.*, 145 U. S. 263, 282, 12 Sup. Ct. 844, 36 L. Ed. 699. Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the interstate commerce act "leaves common carriers as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and their own situation and relation to it, and generally to manage their impor-

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tant interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." *Interstate Commerce Com. v. Alabama Mid. R. R. Co.*, 74 Fed. 715, 21 C. C. A. 51, 41 U. S. App. 453; *Id.*, 168 U. S. 144, 173, 18 Sup. Ct. 45, 42 L. Ed. 414.

The privileges accorded to Westcott were only those which were incident to the anomalous relations existing between him and the defendant created by the contract. It is quite inconceivable that [64] there were or could have been any shippers of milk who would have been willing or able to undertake his duties and responsibilities. In consideration of his assumption of peculiar obligations and hazards, the defendant gave him exceptional privileges appertaining to his relation as a manager of the traffic; this was not an undue and unreasonable preference.

The assignments of error which have been considered are the only ones which have been argued at the bar or on the brief of counsel. The repudiation of the contract was without any justification, for even if the contracts with the New York Central Railroad Company were theoretically competitive, they had been consented to by the officers of the defendant. The repudiation, as has been said, was announced when the contract had nearly expired, and when the defendant would shortly have secured exclusively for itself all the profits of the valuable traffic built up by Westcott. It was repudiated for sordid motives, and with an arrogance born of the scorn of consequences. The appropriation of Westcott's percentage of the money, which the defendant had actually collected for him, was morally no better than larceny. Although Truesdale was primarily responsible for this conduct, and the directors of the defendant may not have been personally cognizant of it, they cannot escape their share of the moral responsibility which ensues from endeavoring to establish the defenses interposed in the earlier action and in this action. It is conduct like Truesdale's, by those who manage the affairs of great corporations, that has aroused the spirit of resentment in the public mind which is so intense to-day, and which is not unlikely to result in legislation, and in municipal interference, which will bring serious loss upon stockholders.

Syllabus.

We find no error in the rulings of the court below, and the judgment is accordingly affirmed.

LACOMBE, Circuit Judge.

I am individually of the opinion that the contract of 1898 with the N. Y. Central Railroad was a breach of the plaintiff's contract with the defendant, because it was calculated to expose the Delaware, Lackawanna & Western R. R. to a competition which would operate to reduce the amount of its milk traffic. But that question is no longer open here. I concur in the finding that the evidence clearly shows that the defendant's officers knew of this contract and did not disapprove it, and in the conclusion that the prior judgment has conclusively established the proposition that neither such contract nor its carrying out is a breach available in defense. As to the second Delaware & Hudson contract, which I am fully convinced was a competing contract, the circumstance that both parties to it agreed that it should not go into effect until after the termination of the contract in suit, which agreement was strictly adhered to, in my opinion, eliminates it from consideration as a breach.

As to the other defenses I concur in Judge Wallace's opinion, and therefore concur in voting to affirm.

[491] CHICAGO WALL PAPER MILLS *v.* GENERAL PAPER CO.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

[147 Fed., 491.]

MONOPOLIES—UNLAWFUL COMBINATION—EFFECT ON COLLATERAL CONTRACT.—A contract for the sale of merchandise is not rendered illegal by the fact that the selling corporation is a trust or monopoly organized in violation of law, either federal or state; the contract of sale being collateral and having no direct relation to the unlawful scheme or combination.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 16.]

SAME—ENFORCEMENT OF SALE CONTRACT—ILLINOIS STATUTE.—Sections 1 and 2 of the Illinois anti-trust law of June 11, 1891 (Laws 1891, pp. 206, 207), prohibit any pool or combination between persons or corporations to fix the price or limit the production of any article or commodity. Section 4 (page 207) provides for the

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punishments of a violation of section 1 by fine or imprisonment. Section 5 (page 208) makes any contract in violation thereof void, and section 6 (page 208) provides that "any purchaser of any article or commodity from any individual, company, or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment." *Held*, that sections 4, 5, and 6 provide cumulative or alternative penalties for a violation of sections 1 and 2, and have no other purpose or effect; that sections 1 and 2 can have no extraterritorial effect, and hence the fact that a seller of merchandise in Illinois is a corporation formed for the prohibited purposes cannot be pleaded as a defense in an action to recover the price unless such corporation was organized in Illinois and was therefore unlawful under the statute.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 16.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The suit is in assumpsit brought by the General Paper Company, a Wisconsin corporation, against the Chicago Wall Paper Mills, a corporation organized under the laws of Illinois, to recover something over \$4,000 for certain wall paper sold and delivered by the plaintiff corporation to the defendant below in the year 1905. The declaration contains the common counts.

To this declaration the defendant interposed the general issue, and also 16 pleas. These pleas set up with great elaboration a defense under the "Anti-Trust Law," so called, of Illinois. The facts set up in the pleas appear more at large in the opinion of the court. Thereafter, by leave of court, another plea was interposed, numbered 17, which substantially reproduced the averments of the 16 pleas, and also set out certain alleged "confessions" of the plaintiff company made since the suit was brought, which are certain answers made under oath in response to interrogatories which the officers of nonresident corporations were compelled to make pursuant to an act of the General Assembly of Illinois, entitled, "An act to regulate the admission of foreign corporations for profit to do business in the state of Illinois." Laws 1891, p. 206. The plea of the general issue was withdrawn, and the defense was rested solely upon the 17 special pleas.

Demurrers were interposed to each of the said 17 pleas, which demurrers were sustained by the Circuit Court, and judgment nihil dicit was rendered in favor of the plaintiff and against the defendant below for the agreed price of the paper, and thereupon the case was brought to this court by writ of error.

The sections of the statute that are material are as follows:

Statement of the Case.

[492] "Pools, Trusts and Combines Prohibited.

"Section 1. Be It enacted by the people of the state of Illinois, represented in the General Assembly: If any corporation organized under the laws of this or any other state or country, for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person, or association of persons, to regulate or fix the price of any article of merchandise or commodity, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this act.

"Sec. 2. It shall not be lawful for any corporation to issue or to own trust certificates, or for any corporation, agent, officer or employees, or the directors or stockholders of any corporation, to enter into any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholder or director thereof, the purpose and effect of which combination, contract or agreement shall be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article."

(Section 3 imposes a fine upon the corporation, firm or association.)

"Sec. 4. Any president, manager, director or other officer or agent or receiver of any corporation, company, firm or association, or any individual found guilty of a violation of the first section of this act, may be punished by a fine of not less than two hundred dollars (\$200), nor to exceed one thousand dollars (\$1,000), or be punished by confinement in the county jail not to exceed one year, or both, in the discretion of the court before which such conviction may be had.

"Sec. 5. Any contract or agreement in violation of any provision of the preceding sections of this act shall be absolutely void.

"Sec. 6. Any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provision of the preceding sections of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment.

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"Sec. 7. The fines hereinbefore provided for may be recovered in an action of debt in the name of the people of Illinois. If, upon the trial of any cause instituted under this act to recover the penalties as provided for in section 3, the jury shall find for the people, and that the defendant has been before convicted of the violations of the provisions of this act, they shall return such finding with their verdict, stating the number of times they find defendant so convicted and shall assess and return with their verdict the amount of the fine to be imposed upon the defendant in accordance with said section 3. Provided, that in all cases under this act, a preponderance of evidence in favor of the people shall be sufficient to authorize a verdict and judgment for the people.

"Sec. 8. It shall be the duty of the prosecuting attorneys in their respective jurisdictions, and the Attorney General, to enforce the foregoing provisions of this act, and any prosecuting attorney of any county, securing a conviction under the provisions of this act, shall be entitled to such fee or salary as by law he is allowed for such prosecution. When there is a conviction under this act, the former shall be entitled to one-fifth of the fine recovered, which shall be paid to him when the same is collected. All fines recovered under the provisions of this act shall be paid into the county treasury of the county [493] in which the suit is tried, by the person collecting the same, in the manner now provided by law to be used for county purposes."

Approved June 11, 1891. Laws 1891, pp. 206-208.

The rulings of the court below in sustaining the demurers to each of said 17 pleas, are assigned as errors.

Almon W. Bulkley, for plaintiff in error.

William Brace, for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and QUARLES, District Judge.

QUARLES, District Judge (after stating the facts).

We deem it unnecessary to consider the question of pleading with respect to the technical character of the seventeenth plea, whether it should be construed as a *puis darrein continuance*, and whether, therefore, it supplants all defenses theretofore interposed, because the seventeenth plea substantially embodies all the material averments of the first 16 pleas, and is sufficient to raise the vital question of law upon which this case must turn. The material facts set out in the several pleas may be put in brief concrete form as follows: The plaintiff corporation is alleged to have been organized

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on the 26th day of May, 1900 in the state of Wisconsin, for the purpose, as stated in its charter, of acting as exclusive sales agent for the paper and paper products thereafter to be produced by 21 certain manufacturing corporations located in the states of Wisconsin and Michigan engaged in the paper industry; that its board of directors consisted of representatives of the 21 paper mills, so that for trade purposes there was a practical amalgamation of the 21 producing companies; that thereupon, on the same day, pursuant to such confederation, the plaintiff corporation became the exclusive sales agent of all such paper mills, with exclusive power to determine the extent of the output, and to fix prices arbitrarily, and that by such confederation, competition between the 21 producing corporations was stifled, and the plaintiff corporation as such sales agent, put in control of 90 per cent. of the paper and paper products manufactured west of the Alleghany Mountains; that immediately after such plaintiff corporation had been so organized and equipped, it came to the city of Chicago, complied with the requirements of the local law, secured a place of business, and has since that time continued to handle and sell such combined product of the 21 mills in Wisconsin, Michigan, Illinois, and other Western states, as contemplated by the agreement of confederation; that the alleged combination is violative of the statute of Illinois, entitled "An act to provide for the punishment of persons, copartners or corporations forming pools, trusts and combines, and mode of procedure and rules of evidence in such cases," approved June 11, 1891, in force July 1, 1891 (Laws 1891, p. 206).

It cannot be successfully contended that the contract in suit falls within the sanction of the fifth section. The contract thereby denounced as void is plainly one which directly contravenes the earlier sections; one in which the trust takes root, or by which the illicit scheme is organized. The defendant below purchased the paper in the ordinary course of business. It was a stranger to the alleged unlawful combination. The sale of the merchandise had no direct relation to the prohibitions of sections 1 and 2. The same distinction has been drawn under the federal anti-trust act (*Hopkins v. United States*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed.

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290; *Anderson v. United States*, 171 U. S. 604, 615, 19 Sup. Ct. 50, 43 L. Ed. 300), and this court has several times held that contracts founded upon a good consideration are collateral to the unlawful scheme or combination and not tainted thereby. *Dennehy v. McNulta*, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609; *Star Brewery Co. v. United Breweries*, 121 Fed. 713, 58 C. C. A. 133; *Harrison v. Glucose Co.*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915.

The real defense tendered by the several pleas is bottomed upon section 6, and it becomes material to analyze this part of the enactment. It will be noted at the outset that the structure of sections 5 and 6, is almost identical. Both hinge upon "violation of any provisions of the preceding sections of this act." Section 4 metes out punishment to officers of the offending corporation for any violation of section 1. So here there are three distinct consequences that flow from infringement of earlier sections: Under section 4, fine and imprisonment; under section 5, the avoidance of contract; and under section 6, denial of civil remedy in the courts. They partake of the same nature. They are penal inflictions of different kinds, consequent upon a single transgression. The violation contemplated in either case must be such as will sustain the penalty imposed by either section. In other words, if the combination effected in Wisconsin constituted such a violation of section 1 as to warrant the exclusion of the plaintiff company from the courts of Illinois under section 6, then a direct proceeding might have been instituted under section 4 to punish the officers of such offending corporation.

The penal character of section 6 sufficiently appears upon its face. To debar trading corporations from all redress in the courts is a drastic infliction. The same conclusion as to the nature of the section is reached by a legal inference. The title of the statute deals only with punishments and the manner of their infliction. If, therefore, section 6 were of a different character, it would contravene section 13 of article 4 of the Constitution of Illinois and be of no effect. It is fundamental and elementary that the General Assembly of Illinois has no jurisdiction to provide any punishment for an act done outside the territorial limits of the state. It can-

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not project its public policy into another sovereignty. The dereliction charged against the plaintiff below by the several pleas inheres in its contract relations with the 21 producing companies whereby, as claimed, it was intended to suppress competition, restrict the output, and arbitrarily fix the price of paper. This illicit combination culminated in the organization of the plaintiff corporation and the agreement by which it was to officiate as exclusive sales agent. Thereby the combine became an accomplished fact which, for aught that appears, may not have infringed the public policy of Wisconsin. All these things happened five years before the contract in suit, and took place within the State of Wisconsin before [495] the plaintiff entered upon any business in Chicago. Since that time nothing has happened, certainly nothing within the state of Illinois, of which section 1 takes cognizance. It is argued that the Illinois statute is unconstitutional, and that a combination formed in one state to control prices in another states affects interstate commerce and therefore is not subject to state regulation. We are not concerned with the constitutionality of this act, if it can, in no event, be applicable to the case at bar. The Supreme Court of Illinois has had occasion to interpret this statute, and the doctrine which it lays down is decisive of the issues here.

In *People v. Butler Street Foundry Co.*, 201 Ill. 236, 66 N. E. 349, the court say:

"It is fundamental that the Legislature of this state is powerless to pass an enactment making an act committed in a foreign state punishable in that state, or the Legislature of a foreign state to pass an enactment to make an act committed in this state a crime punishable in this state. It is therefore evident that a violation of the statute above set forth in this state cannot be punished as an original offense in a foreign state, and that the immunity afforded by the statute is complete against a prosecution under the law of the other states of the Union. The anti-trust statute of 1891 has no extra-territorial effect. While its terms may be broad enough to include trusts, pools, combines, etc., formed with parties residing outside of this state, the courts, in construing it, must necessarily confine it to those matters upon which the General Assembly has power to act, viz, trusts, pools, combinations, etc., formed within the state of Illinois. In the construction of the statute the courts will exclude from the operation thereof subjects or classes upon which the state Legislature has no power to legislate, though comprehended within the general terms of the act, unless the different parts of the statute are so connected that they cannot be separated without destroying the evident intention of the Legislature. * * * If the statute be confined to its legitimate constitutional scope, its proper construction

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only requires the affidavit to state whether or not the corporation upon whose behalf it is made had violated the statute by performing some one or more of the acts therein prohibited within the state of Illinois, and would not include, but would exclude all acts which would connect it with any trust, pool, combination, etc., formed outside of the state, and which would violate the anti-trust statute of the United States. * * * In making the affidavit the affiant is only required to take into consideration the acts of the corporation while engaged in business wholly within the state and if, in connection with that business, it has not been connected with any trust, pool, or combination within the state, or otherwise violated the Illinois anti-trust statute, he can truthfully make the affidavit to that effect, although the corporation at the same time, in its business outside the state, has been connected with trusts, pools, combinations, etc., in violation of the United States anti-trust statute; that being a matter exclusively within the jurisdiction of the United States and over which the state has no control and to which the statute of this state does not apply. * * * We conclude, therefore, that the officer making the affidavit, and the corporation in whose behalf the same is made, are fully protected by the statutory immunity from a prosecution by any other state or by the federal authorities."

We are reminded that section 6 was not specifically involved in that case. This is immaterial. The discussion above recited was vital to the very questions before the court, so that the opinion is authoritative and applies with full force to every portion of the act.

There is nothing decided in *Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770, which is inconsistent with the doctrine of the earlier case. [496] It may be conceded that if a foreign corporation enter into a combine within the state of Illinois which is forbidden by the statute, it must stand upon the same footing as a domestic corporation, and be liable to all the pains and penalties of the act, without regard to the place of its origin. It is therefore apparent that a direct proceeding could not be sustained to subject the officers of the General Paper Company to the penalties of section 4 for an alleged transgression occurring in Wisconsin. The same reasoning must be fatal to a defense based upon section 6.

We adopt and follow the conclusion of the Supreme Court of the state. It results, therefore, that the Illinois anti-trust act, so called, is not available as a defense to this action, and the judgment of the Circuit Court is affirmed.

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MINES v. SCRIBNER ET AL.

(Circuit Court, S. D. New York. July 7, 1906.)

[147 Fed., 927.]

1. **MONOPOLIES—AGREEMENTS IN RESTRAINT OF TRADE.**—An agreement by the members of a publishers' association controlling 90 per cent of the book business of the country, under which all agreed not to sell to anyone who would cut prices on copyrighted books, nor to anyone who should be known to have sold to others who cut prices, etc., was an agreement relating to interstate trade or commerce, within the antitrust act. Act July 2, 1890, c. 647, 26 Stat., 209 [U. S. Comp. St. 1901, p. 3200].

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 13.]

2. **SAME—CONSPIRACY—RESTRAINT OF TRADE.**—Defendants became members of an association of book publishers controlling 90 per cent of the book business of the country, which association adopted a rule that they would not sell to anyone who cut prices on copyrighted books, nor to anyone who should be known to have sold to others at cut prices. A black list was kept containing the names of such persons, and no one on the black list could buy any books of anybody in the scheme. Held, that such scheme constituted a conspiracy in restraint of interstate trade or commerce.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Monopolies, § 13.]

3. **COPYRIGHT—EFFECT—EXTENT OF RIGHTS ACQUIRED.**—The rights acquired by publishers of copyrighted books under the copyright law did not justify them in combining and agreeing that their books should be subject to the rules laid down by the united owners, one of which was that no member of the association should sell any books to a black-listed purchaser who was known to cut prices.^a

Theodore Baumeister, for complainant.

Stephen H. Olin, for defendants.

PLATT, district judge. This is a demurrer to a complaint brought under the United States statute of July 2, 1890 (26 Stat., 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), commonly known as the "Anti-Trust Act." It contends that upon

^a Syllabus copyrighted, 1906, West Publishing Company.

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the facts alleged the case can not be brought within the statute, for several reasons:

1. Because it does not relate to interstate trade or commerce. I think that it does.

2. Because it does not show that the defendants have entered into any contract, combination, or conspiracy in restraint of interstate trade or commerce, nor that they have attempted to monopolize, either directly or by combination, any article which is the subject of such trade or commerce. I think that it does, and let me say just a word in connection with my conclusion. A rapid glance at the case develops, among other things, the following state of affairs: Defendants, with others, became members of the American Publishers' Association, whereby 90 per cent of the book business of the country was controlled. A rule was adopted and agreed to all around that they would not sell to anyone who cut prices on copyrighted books, nor to anyone who should be known to have sold to others who cut prices. A black list was to be kept, containing the names of such persons, and no one on that black list could buy any books of anybody in the scheme. Plaintiff got on the black list, could not buy, and was thereby injured, and claims his treble damages.

It is true that this scheme does not prevent each publisher from putting such price as he sees fit upon his copyrighted book; but it compels jobber and retailer to stand by that price, whatever it may be, and if it is broken in any instance it puts such person out of business. It is not content with refusing to deliver any more copies of the particular book upon which he cuts the price, but it closes him out of all dealings on any and every book, copyrighted or not.

The copyright law can not help the defendants, because, in the first place, the restraint is not confined to copyrighted books, and, if it were, it can not be so that the right given a single publisher to do as he pleases with his copyrighted book can be extended, so that he can combine with other owners of copyrights and permit his book to be subject to the rules laid down by the united owners.

Let the demurrer be overruled.

